93-597

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

MARK G.A. WELSH, a minor, and
ELLIOTT A. WELSH, his father and next friend,

Petitioners,

v.

BOY SCOUTS OF AMERICA and BOY SCOUTS OF AMERICA
WEST SUBURBAN COUNCIL #147,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals err in holding that the Boy Scouts of America is not covered by the anti-discrimination provisions of Title II of the 1964 Civil Rights Act because it is not a "place" of public accommodation?

2. Did the Court of Appeals correctly determine that membership organizations are not within the scope of Title II unless they operate from a fixed location?

LIST OF ALL PARTIES

MARK G.A. WELSH,
a minor

ELLIOTT A. WELSH,
his father and next friend

Petitioners and Plaintiffs below,

BOY SCOUTS OF AMERICA and BOY SCOUTS OF AMERICA WEST SUBURBAN COUNCIL # 147,

Respondents and Defendants below.

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OPINIONS BELOW

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

742 F.Supp. 1413 (N.D. Ill. 1990):

(The District Court's denial of Respondents' motion to dismiss appears as Appendix D herein).

1991 WL 77179 (May 3, 1991)

(The District Court's ruling on Petitioner's motion for Summary Judgment appears as Appendix C herein).

787 F.Supp. 1511 (N.D. Ill. 1992):

(The District Court's ruling on the merits appears as Appendix B herein).

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

993 F.2d 437 (7th Cir. 1992):

(The opinion by the Seventh Circuit Court of Appeals affirming the District Court's opinion and judgment appears as Appendix A herein).

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) on the grounds that the United States Court of Appeals for the Seventh Circuit has decided a federal question in a way that conflicts with applicable decisions of this Court, and that the case presents an important question of federal law which should be decided by this Court.

The final judgment of the United States Court of Appeals for the Seventh Circuit was entered May 17, 1993. This petition for certiorari is filed within the extension period granted by Justice Stevens in this matter.

STATUTORY PROVISIONS

42 U.S.C. § 200(a) *et. seq.* provides as follows:

§ 2000a. Prohibition against discrimination or segregation in places of public accommodation.

(a) Equal access. All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

(b) Establishments affecting interstate commerce or supported in their activities by State action as places of public accommodation; lodgings; facilities principally engaged in selling food for consumption on the premises; gasoline stations; places of exhibition or entertainment; other covered establishments. Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title if its operations affect commerce, or if discrimination or segregation by it is supported by State action:

(1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;

(2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;

(3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and

(4) any establishment (A)(i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment".

STATEMENT OF THE CASE

The Petitioners in this matter are Mark G.A. Welsh, a ten year old, and Elliott Welsh, his father.

On March 21, 1990, Petitioners brought suit against Respondents Boy Scouts of America and Boy Scouts of America West Suburban Council #147 alleging that they had violated the provisions of Title II (42 U.S.C. §§ 2000a *et. seq.)* by refusing to admit Petitioners to the Tiger Cubs program of BSA for failure to acknowledge a duty to God. Petitioners further alleged that BSA was a place of public accommodation under 42 U.S.C. § 2000a(b)(3) in that BSA qualified as a "place of entertainment" because it allowed members to use BSA facilities for entertainment purposes.

Respondents filed a motion to dismiss, claiming, *inter alia,* that BSA was neither a "place" nor an "accommodation" within the meaning of Title II.

On August 9, 1990, the District Court issued an opinion denying Defendants' motion to dismiss. *Welsh v. Boy Scouts of America,* 742 F.Supp. 1413 (N.D. Ill. 1990). (See App. D). The Court's opinion considered, *inter alia,* the "place" issue and concluded that "[t]he Court finds no basis for excluding from Title II's reach organizations which do not operate a unitary definite 'place' of business but rather carry out their activities in a large number of temporary locations". *Welsh, supra,* 742 F.Supp. at 1421.

On December 5, 1990, Plaintiff filed an amended complaint adding a count relating to the Cub Scout program of BSA.

On January 7, 1991, Plaintiffs filed a motion for Summary Judgment, which the Court denied by opinion on May 3, 1991. (See App. C).

The case proceeded to trial on June 10, 1991, and the District Court heard testimony over the course of six days.

On March 13, 1992, the Court issued its opinion on the merits. *Welsh v. Boy Scouts of America*, 787 F.Supp. 1511 (N.D. Ill. 1992). (See App. B).

The District Court's conclusion was that BSA was not covered by Title II because:

> Membership organizations *per se*, which do not operate from or supply access to a particular facility or location, do not qualify as "places of accommodation" within the meaning of Title II.

Welsh, 787 F.Supp at 1541.

Petitioners appealed to the Court of Appeals for the Seventh Circuit which rendered its opinion in the matter on May 17, 1993. *Welsh v. Boy Scouts of America*, 993 F.2d 1267 (7th Cir 1993). (See Appendix A). The Court of Appeals affirmed the District Court's conclusion that BSA is not covered by Title II because it is not a "place of entertainment". The Court concluded that:

> ...Title II of the Civil Rights Act of 1964 does not govern membership organizations which do not bear a close connection to a particular "establishment", "place", or "facility".

993 F.2d at 1275.

In *dicta*, the Court of Appeals also found that the Boy Scouts of America qualify for the "private club" exemption embodied in 42 U.S.C. §2000 a(e).

Judge Cummings dissented, disparaging the majority's construction of the statute as "stingy and narrow". 993 F.2d at 1279 (Cummings, J., dissenting). Judge Cummings opined that the majority failed to construe a remedial civil rights statute broadly in contravention of Supreme Court precedent, 993 F.2d at 1280, and rejected the majority's emphasis on the word "place". 993 F.2d at 1282. However, Judge Cummings declared that he would have ultimately found for BSA on constitutional grounds.

Argument for Granting the Writ

I.
INTRODUCTION

This case generally concerns the scope of Title II of the 1964 Civil Rights Act (42 U.S.C. §2000a *et. seq.)*, and in particular, the statutory language "other place of exhibition or entertainment" (42 U.S.C. §2000a(b)(3)). Specifically, the question is whether a large membership organization, the Boy Scouts of America ("BSA"), is a "place" of entertainment within the meaning of Title II, and therefore subject to that statute's anti-discrimination provisions.

Below, Plaintiffs argued that because the scouting program of BSA is based in large part on providing entertainment to its members, and because it ostensibly met the other criteria for "public accommodation" status under the statute, BSA is covered by Title II, and therefore could not exclude Plaintiffs from membership because they are agnostic. However, both the District and Appellate Courts found that BSA is not covered by Title II because it is not a "place". That is, the Courts below determined that membership organizations like BSA, that do not operate from a specific structural facility or location, are not covered by Title II because the statute only proscribes discrimination in fixed, pinpointable, "places" of public accommodation. Plaintiffs submit that the Seventh Circuit's decision in this matter should be reviewed by writ of certiorari because, as more fully explained below, it conflicts with this Court's decisions and because it unduly restricts the scope of an important remedial civil rights statute.

II.
THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT CONFLICTS WITH THE APPLICABLE DECISIONS OF THIS COURT

In the District and Appellate Courts Plaintiffs argued, and it was not disputed, that Title II is a remedial statute. It is a "...familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes." *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967). Indeed, in this Court's most salient encounter with Title II, *Daniel v. Paul*, 395 U.S. 298 (1969), it was held that the phrase "place of entertainment" should be construed broadly in light of Title II's "overriding purpose" (the elimination of humiliation attendant to discriminatory denials of access to public accommodations). 395 U.S. at 307-08. And the dissenting Court of Appeals judge noted that the federal appellate courts "have been repeatedly instructed by the Supreme Court to interpret the statute [Title II] liberally". *Welsh v Boy Scouts of America*, 993 F.2d 1267, 1280 (7th Cir. 1993) (Cummings, J. dissenting). Despite this, the Appellate Court, with one dissent, affirmed the District Court's holding that "[m]embership organizations *per se*, which do not operate from or supply access to a particular facility or location, do not qualify as 'places of public accommodation' within the meaning of Title II". *Welsh v Boy Scouts of America*, 787 F.Supp 1511, 1541 (1992).

The dissent characterized the majority's holding as a "stingy and narrow reading" which "unduly constrict[s] the reach of a remedial civil rights statute: Title II". *Welsh*, 993 F.2d at 1279, 1284 (Cummings, J. dissenting). As more fully explained below, Plaintiffs submit that the conflict between the Seventh Circuit's holding here, and this Court's opinion in *Daniel v. Paul, supra*, is acute and should be corrected by issuance of a writ of *certiorari*.

In *Daniel,* the Court was required to focus on the very language from Title II under consideration here: "other place of entertainment". (42 U.S.C. §2000a(b)(3)). The establishment involved was a 233 acre amusement area which offered swimming, dancing, boating, picnicking, etc. It was argued that the park was not covered under Title II because Congress used the phrase "place of entertainment" to refer only to "establishments where patrons are entertained as spectators or listeners rather than those whose entertainment takes the form of direct participation in some sport or activity". *Daniel,* 395 U.S. at 306. This Court emphatically rejected the argument. After examining the legislative history, the Court concluded:

> Admittedly, most of the discussion in Congress regarding the coverage of Title II focused on places of spectator entertainment rather than recreation areas. But it does not follow that the scope of §201(b)(3) should be restricted to the primary objects of Congress' concern when a natural reading of its language would call for broader coverage. In light of the overriding purpose of Title II "to remove the daily affront and humiliation involved in discriminatory denials of access to facilities ostensibly open to the general public," H.R. Rep. NO 914, 88th Cong., 1st sess., 18, we agree with the *en banc* decision of the Court of Appeals for the Fifth Circuit in *Miller v. Amusement Enterprises, Inc.* 394 F.2d 342 (1968), that the statutory language "place of entertainment" should be given full effect according to its generally accepted meaning and applied to recreational areas.

395 U.S. at 307-08.

In *Miller, supra,* the Fifth Circuit, *en banc* ,had declared that:

> We do not read [Title II] with narrowed eye but with open minds attuned to the clear and strong purpose of the Act, namely, to secure for all citizens the full enjoyment of facilities described in the Act which are open to the general public.

394 F.2d at 349.

The Court in *Daniels* also observed that:

> Under any accepted definition of 'entertainment' the [park] would surely qualify as 'a place of entertainment'. And indeed it advertises itself as such. [footnotes omitted].

395 U.S. at 306.

The teachings of *Daniel v. Paul, supra,* are manifest here. Title II is to be read liberally in light of its broad remedial purpose. Nor should the scope of 2000a(b)(3) "...be restricted to the primary objects of Congress' concern when a natural reading of its language would call for broader coverage". 395 U.S. at 307. Just as the Court in *Daniel* found it easy to reach the conclusion that "the [park] would qualify as 'a place of entertainment', here a "natural" reading (as opposed to the Seventh Circuit's strained and hypertechnical reading) of the language of Title II yields the inevitable conclusion that BSA is a "place of entertainment". It was not seriously disputed, in any of the Courts below, that the Boy Scout program is intended to be, and is, entertaining. And, as the dissent noted, the locales where BSA meets are "places" ("...meetings are not held in outer space". *Welsh,* 993 F.2d at 1281 (Cummings, J., dissenting)). The "natural" conclusion is that BSA is a "place of entertainment". Under *Daniel,* even though "...the primary objects of Congress' concern..." in enacting Title II were "fixed site" places of entertainment, that does not mean organizations offering entertainment at various sites are exempt from the strictures of the law. Any other conclusion would mean

that Congress enacted a law under which discrimination is prohibited if entertainment is offered by an organization at one location, but is permitted if entertainment is offered by that same organization at many locations. A natural reading of Title II (i.e. wherever BSA meets is clearly a "place" where "entertainment" is offered) avoids these absurd results.

In sum, the conflict between the Seventh Circuit's opinion in the case *sub judice* and this Court's opinion in *Daniel v. Paul, supra,* could not be more acute in either reasoning or result. In a case involving the *same three words* construed in *Daniel,* ("place of entertainment") the Appellate Court failed to adhere to this Court's admonition that Title II is to receive a broad reading. The Seventh Circuit also ignored a long line of cases, some of which are this Court's (i.e. *Tcherepnin v. Knight,* 389 U.S. 332 (1967)), mandating liberal construction of remedial statutes generally. Instead, the Court provided the statute with a cramped and narrow construction, which seemed designed to avoid the natural conclusion that BSA is a "place" where entertainment is offered. The Seventh Circuit's preoccupation with the word "place", rather than the statute's overriding remedial purpose (to eradicate discrimination wherever it occurs) is clear error under *Daniel.* Plaintiffs respectfully submit that a writ of *certiorari* should issue to the Seventh Circuit to protect this Court's precedents.

Finally, this case is important. The consequences of the judicial error alleged to have occurred here are not personal to Petitioners. Title II is a broad, remedial civil rights statute that affects literally millions of establishments (and persons) throughout the Nation. Moreover, if left uncorrected, the Seventh Circuit's decision could be interpreted as a signal that the federal courts (including this Court) are no longer committed to the liberal construction of remedial legislation. Accordingly, a writ of *certiorari* should issue to the Seventh Circuit in this case.

CONCLUSION

It is clear that the Seventh Circuit's opinion conflicts with this Court's decision in *Daniel v. Paul* in particular, and more generally, with the canon of statutory construction requiring remedial legislation to be construed broadly. The resolution of this conflict is crucial because of the importance of Title II to millions of businesses and people. For those reasons Plaintiffs respectfully request that a Writ of Certiorari issue to review the judgment and opinion of the Court of Appeals for the Seventh Circuit.

APPENDIX A

In the
United States Court of Appeals
For the Seventh Circuit

No. 92-1853

MARK G.A. WELSH, a minor, and ELLIOTT A. WELSH, his father and next friend,

Plaintiffs-Appellants,

v.

BOY SCOUTS OF AMERICA and BOY SCOUTS OF AMERICA WEST SUBURBAN COUNCIL #147,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 90 C 1671—**Ilana Diamond Rovner**, *Judge.*

ARGUED NOVEMBER 13, 1992—DECIDED MAY 17, 1993

Before CUMMINGS and COFFEY, *Circuit Judges*, and WOOD, JR., *Senior Circuit Judge.*

COFFEY, *Circuit Judge.* Elliott Welsh and his seven year-old son Mark have brought suit asking the United States Courts to force the Boy Scouts of America to accept Mark as a member despite the fact that he refuses to comply with its Constitution and By-laws and affirm his belief in God. The Scouts refused Mark admission to membership in the scout troop and denied his father the opportunity to act as an adult partner. In their complaint, the plaintiffs allege that the defendant organization is a

place of public accommodation practicing unlawful religious discrimination under Title II of the Civil Rights Act of 1964. 42 U.S.C. § 2000a (1988) (barring discrimination in places of public accommodation). This case presents a matter of first impression for the federal courts concerning the scope of Title II. *See Welsh v. Boy Scouts of America*, 787 F. Supp. 1511 (N.D.Ill. 1992) ("*Welsh II*").[1] We affirm.

I. *BACKGROUND*

The facts are undisputed: the district court opinion details fifty-two separate stipulated facts as well as twelve factual findings. Because the appellant does not challenge any of the trial court's factual findings, we accept those facts as true and decide only the issues of law.

The question before the court is whether Title II of the Civil Rights Act of 1964 bars the Boy Scouts of America from denying membership to any person who refuses to profess a belief in and duty to a Supreme Being. The plaintiffs sued the Boy Scouts alleging that a local Scout organization in the Chicago, Illinois area denied them membership because of the Welshes' refusal to recite the Boy Scout Membership Oath which requires scouts to express among other things a belief in God. The Oath states:

> "On my honor I will do my best to do my duty to God and my country and to obey the Scout law, to help other people at all times, to keep myself physically strong, mentally awake and morally straight."

The plaintiffs argue that the defendant's exclusion of them from the Boy Scouts constitutes impermissible discrimination on the basis of religion in violation of Title II. Title II prohibits discrimination in public accommodations and states:

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[1] The district court also issued a pre-trial ruling denying the defendant's motion for dismissal. *See Welsh v. Boy Scouts of America*, 742 F. Supp. 1413 (N.D. Ill. 1990) (*Welsh I*).

"§ 2000a. Prohibition against discrimination or segregation in places of public accommodation.

(a) Equal access. All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

(b) Establishments affecting interstate commerce or supported in their activities by State action as places of public accommodation; lodgings; facilities principally engaged in selling food for consumption on the premises; gasoline stations; places of exhibition or entertainment; other covered establishments. Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title if its operations affect commerce, or if discrimination or segregation by it is supported by State action:

(1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;

(2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;

(3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and

(4) any establishment (A)(i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) with-

> in the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment.

42 U.S.C. § 2000a(a)-(b).

II. *DISCUSSION*

A. *Place of Public Accommodation*

The initial question before the court is whether Congress intended to govern organizations like the Boy Scouts within the statutory language "place of public accommodation" or "other place of . . . entertainment?" 42 U.S.C. § 2000a(b). A reading of the statute for its plain meaning renders but one conclusion: Congress when enacting § 2000a(b) never intended to include membership organizations that do not maintain a close connection to a structural facility within the meaning of "place of public accommodation." The statute clearly governs only an entity that: (1) "serves the public" and (2) may be classified as an "establishment," "place," or "facility." *Id.*

Title II delineates the entities included therein as places, establishments, lodgings, and facilities. The statute also provides fifteen specific examples of regulated facilities, including inns, hotels, motels, restaurants, cafeterias, lunch rooms, lunch counters, soda fountains, retail establishments, gas stations, movie houses, theaters, concert halls, sports arenas, and stadiums. 42 U.S.C. § 2000a(b). None of the listed entities remotely resembles a membership organization. Despite this fact, the plaintiffs argue that the defendant organization is included under the language "other place of exhibition or entertainment." *Id.* § 2000a(b)(3). They claim that "the fact that [the Boy Scouts] offer entertainment to the public at various locations, all of which are 'places', . . . subjects them to the strictures of Title II." Appellants' brief at 10. The clear language of the statute mandates a different conclusion, for we must always be cognizant of the fact that "the legislative purpose is ex-

pressed by the ordinary meaning of the words used." *Richards v. United States*, 369 U.S. 1, 9 (1962). The statute in listing several specific physical facilities, sheds light on the meaning of "other place of exhibition or entertainment." This list reveals Congress' intent to regulate facilities as opposed to gatherings of people. Additionally, subsection (b)(4) refers only to physical structures such as buildings: "any establishment . . . which is physically located within the premises of any establishment otherwise covered by this subsection, or . . . within the premises of which is physically located any such covered establishment, . . ." *Id.* § 2000a(b)(4). While the statute repeatedly refers to physical facilities it fails to refer to, much less delineate, anything resembling a membership organization or an association. The phrase "other place of exhibition or entertainment" does include facilities such as bowling alleys, golf courses, tennis courts, gymnasiums, swimming pools and parks, *see, e.g., United States v. Lansdowne Swim Club*, 713 F. Supp. 785 (E.D.Pa. 1989), *aff'd*, 894 F.2d 83 (3rd Cir. 1990) (applying Title II to a community swimming pool), but even a broad reading of the statute, as required in *Daniel v. Paul*, 395 U.S. 298, 308 (1969), fails to encompass membership organizations whose purpose is not closely connected to a particular facility.

Consider as an analogy a hypothetical city ordinance requiring "the licensing of all dogs." It would be foolish to argue that the language of the ordinance also includes the licensing of cats. The plaintiffs' interpretation of Title II reaches out to include not another type of *facility* but rather a completely different type of entity (an organization of young boys in a group setting under adult leadership to foster respect for God, their country and their fellow man). The Boy Scouts is as different from the facilities listed in Title II as dogs are from cats.

Despite the clarity and specificity of the statute, the plaintiffs would have us believe that even though Congress focused on physical facilities, it also intended to regulate a wide spectrum of consensual human relation-

ships. The plain meaning of the words in the statute renders this interpretation of Title II untenable. "The 'strong presumption' that the plain language of the statute expresses congressional intent is rebutted only in 'rare and exceptional circumstances,' when a contrary legislative intent is clearly expressed." *Ardestani v. I.N.S.*, 112 S. Ct. 515, 520 (1991) (citation omitted). Congress has not expressed a contrary legislative intent regarding the scope of Title II. In fact, the United States Supreme Court, when interpreting the statute, stated that "the overriding purpose of Title II [is] 'to [re]move the daily affront and humiliation involved in discriminatory *denials of access to facilities* ostensibly open to the general public.' " *Daniel*, 395 U.S. at 307-08 (quoting H.R.Rep. No. 914, 88th Cong., 1st Sess., 18) (emphasis added). It is only in this context—denial of access to public facilities—that courts must interpret Title II broadly. *Id.*

The dissent argues that because the 1990 Americans with Disabilities Act, 42 U.S.C.A. § 12,181 (West Supp. 1992) (involving public accommodation), expands the number of establishments in its definition of "places of public accommodation," this court must expand Title II to include membership organizations.[2] This argument fails to

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[2] In the Americans with Disabilities Act, 42 U.S.C.A. § 12,181 (West Supp. 1992), Congress specifically delineated the scope of the term "accommodation":

> "(7) **Public accommodation**
>
> The following private entities are considered public accommodations for purposes of this subchapter, if the operations of such entities affect commerce—
>
> **(A)** an inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor,
>
> **(B)** a restaurant, bar, or other establishment serving food or drink;

(Footnote continued on following page)

recognize, that had Congress intended to include membership organizations lacking a close connection to a specific facility, it would have incorporated such a mandate in the Disabilities Act. On two separate occasions, in the original enactment (Title II of the Civil Rights Act of 1964) and now in the 1990 Disabilities Act, Congress saw fit not to include membership organizations. In the recently enacted Disabilities Act, Congress listed over fifty specific facilities subject to regulation, but did not include membership organizations lacking a close connection to a physical facility. *See id.* We refuse to read into the statute what Congress has declined to include. "[W]e must assume Congress un-

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[2] *continued*

> (C) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;
>
> (D) an auditorium, convention center, lecture hall, or other place of public gathering;
>
> (E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;
>
> (F) a laundromat, dry-cleaner, bank, barber shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office or a health care provider, hospital, or other service establishment;
>
> (G) a terminal, depot, or other station used for specified public transportation;
>
> (H) a museum, library, gallery, or other place of public display or collection;
>
> (I) a park, zoo, amusement park, or other place of recreation;
>
> (J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;
>
> (K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and
>
> (L) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation."

Id.

derstood the meaning of the words it incorporated into the [Act]." *Jones v. Hanley Dawson Cadillac Co.*, 848 F.2d 803, 807 (7th Cir. 1988). We as judges of the U.S. Court of Appeals have only the power to interpret the law; it is the duty of the legislative branch to make the law. We must "refuse[ ] to infringe on the legislative prerogative of enacting statutes to implement public policy . . . . 'The problems of public policy . . . are for the legislature' and . . . 'our job is one of interpreting statutes, not redrafting them.' " *Wangen v. Ford Motor Co.*, 294 N.W.2d 437, 469 (Wisc. 1980) (Coffey, J., dissenting) (quoting *State v. Princess Cinema of Milwaukee*, 292 N.W.2d 807, 815 (Wisc. 1980)).

The dissent has failed to point us to a single word in the statute that supports its theory that Congress intended to cover membership organizations lacking a close connection to a particular facility. Our colleague merely comments that, "if it is open to the public, it must be open to all the public." Dissent at 33. This begs the question of whether the Boy Scouts "serve the public," and are to be considered an "establishment," "place," or "facility."

If the plaintiffs wish to change the law, the proper forum is the Congress of the United States where all interested parties will be entitled to engage in the full panoply of hearings and arguments before the congressional and senatorial committees. Only after Congress has had the opportunity for deliberation and reflection should a radical change of the nature the plaintiffs propose be enacted. *See, e.g., In re Grabill Corp.*, 976 F.2d 1126, 1127 (7th Cir. 1992) (Coffey, J., concurring); *Wangen*, 294 N.W.2d at 469 (Coffey, J., dissenting). Certainly, federal judges must not reach out and grasp at straws in an attempt to rewrite the laws duly enacted by the legislative branch of government, the Congress.

The trial court's thorough and well-reasoned opinion reviewed the state law cases interpreting state public accommodation statutes and discussed four cases holding that the Jaycees, a membership organization like the Boy

Scouts, was not considered a "place of public accommodation." *See Welsh II*, 787 F. Supp. at 1523 (citing *United States Jaycees v. Iowa Civil Rights Commission*, 427 N.W.2d 450 (Iowa 1988); *United States Jaycees v. Massachusetts Comm'n Against Discrimination*, 463 N.E.2d 1151 (Mass. 1984) ("*MCAD*"); *United States Jaycees v. Richardet*, 666 P.2d 1008 (Alaska 1983); *United States Jaycees v. Bloomfield*, 434 A.2d 1379 (D.C. App. 1981)). The Massachusetts Supreme Court best summarized the reasoning of these cases with the following language:

> "The MCAD's interpretation of [the statute] as including the U.S. Jaycees does not call for the mere addition of another physical 'site' to the statutory language, but instead it requires the addition of a type of 'conduct' (a non-profit organization's membership policy). Such an interpretation cannot be derived from the plain language or a reasonable construction of [the statute]."

MCAD, 463 N.E.2d at 1159. The Massachusetts Supreme Court and other courts have also made clear the difference between membership organizations such as Little League sports and the YMCA where membership merely serves as a means of access or a "ticket" to a physical location or a facility, and membership organizations such as the Jaycees and the Boy Scouts where membership entitles one to participate in group interactive activities irrespective of a facility. *MCAD*, 463 N.E.2d at 1159; *Welsh II*, 787 F. Supp. at 1524, 1530.

We are aware that certain state courts have in instances interpreted their respective state statutes dealing with public accommodation to cover organizations like the Boy Scouts. However, in all but two of those instances, the state public accommodation statute was far broader and more inclusive than the federal statute before us.[3] For

[3] It is clear that Congress drafted Title II with more restricted language than many if not all of the state public accommodation statutes. *See Welsh II*, 787 F. Supp. at 1538.

cases interpreting broadly worded state public accommodation statutes, *see Quinnipiac Council, Boy Scouts, Inc. v. Commission on Human Rights and Opportunities*, 528 A.2d 352 (Conn. 1987); *Curran v. Mount Diablo Council of the Boy Scouts*, 147 Cal. App. 3d 712 (1983); *United States Jaycees v. McClure*, 305 N.W.2d 764 (Minn. 1981). For cases in which the state public accommodation statute was similar to Title II, *see United States Power Squadrons v. State Human Rights Appeal Board*, 452 N.E.2d 1199 (N.Y. 1983); *National Organization for Women v. Little League Baseball, Inc.*, 318 A.2d 33 (N.J. Super. 1974) ("*NOW*"). In *NOW*, the New Jersey Superior Court held that a Little League program which used public baseball fields and extended an open invitation to all boys of a certain age in the community at large constituted a place of public accommodation and thus could not discriminate against girls. *Id.* at 37. In *Power Squadrons*, the New York Court of Appeals held an organization that trained men in water skills and used facilities in public schools, parks and waterways constituted a place of accommodation because it conducted public activities in public facilities and therefore could not refuse membership to women. 452 N.E.2d at 1202-04. Both *NOW* and *Power Squadrons* state that "place" "is a term of convenience, not of limitation." *NOW*, 318 A.2d at 37, *Power Squadrons*, 452 N.E.2d at 1203. We refuse to accept this interpretation. To conclude that Title II includes membership organizations like the Boy Scouts, one would have to assume that Congress' use of the term "place" was mere surplusage in the statute, and that the fifteen specific examples of places fail to illuminate the meaning of the term "place." The plaintiffs' and the dissent's interpretation of the term "place" fails to pay heed to the rule of statutory construction that "a court should not construe a statute in a way that makes words or phrases meaningless, redundant, or superfluous." *Zimmerman v. North Am. Signal Co.*, 704 F.2d 347, 353 (7th Cir. 1983). We agree with the decision of the Massachusetts Supreme Court in *MCAD* holding that an organization is only a "place of public accommodation" when

the organization functions as a "ticket" to admission to a facility or location. *MCAD*, 463 N.E.2d at 1159; *Welsh II*, 787 F. Supp. at 1524, 1530.[4]

Several federal court opinions have held that Title II governs membership organizations that are closely connected to a facility or structure, but we have been unable to find, any case holding that Title II governs a membership organization like the Scouts whose purpose is not closely connected to a particular facility. *See Smith v. YMCA of Montgomery*, 462 F.2d 634, 636 (5th Cir. 1972) (the YMCA operated gymnasiums, a health club and swimming pools); *Nesmith v. YMCA of Raleigh, N.C.*, 397 F.2d 96, 99-100 (4th Cir. 1968) (same); *United States v. Lansdowne Swim Club*, 713 F. Supp. 785, 790 (E.D. Pa. 1989), *aff'd*, 894 F.2d 83 (3rd Cir. 1990) (club operated a swimming pool); *Durham v. Red Lake Fishing & Hunting Club, Inc.*, 666 F. Supp. 954, 959 (W.D. Tex. 1987) (club owned 400 acres of land for hunting and fishing); *United States v. Slidell Youth Football Ass'n*, 387 F. Supp. 474 (E.D. La. 1974) (a youth football league owned a recreational facility with fields, grandstand and a concession stand); *Auerbach v. African Am. Teacher's Ass'n*, 356 F. Supp. 1046, 1048 (E.D.N.Y. 1973) (organization held public meetings in a public school auditorium); *Wesley v. City of Savannah*, 294 F. Supp. 698, 701-02 (S.D. Ga. 1969) (city operated a public golf course and was barred from hosting a racially discriminatory golf tournament); *Williams v. Rescue Fire Co.*, 254 F. Supp. 556, 563 (D. Md. 1966) (a non-profit association operated a swimming pool and skating rink). In each of these cases, Title II was found applicable because the

[4] The dissent faults the majority for failing to discuss *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), and *Board of Directors of Rotary Int. v. Rotary Club*, 481 U.S. 537 (1987). These two cases are of no precedential value because: (1) both cases involved broadly worded state statutes; and (2) in neither case was the Court required to interpret the state statute in question. Thus, citation to *Roberts* and *Rotary Club* is of no value when determining the meaning of the more narrowly worded federal statute (Title II).

organization conducted public meetings in public facilities or operated *facilities* open to the public like swimming pools, gyms, sports fields and golf courses. In contrast, the trial court in the case before us found that the typical Boy Scout gathering involves five to eight young boys engaging in supervised interpersonal interaction in a private home. *Welsh II*, 787 F. Supp. at 1516. As previously explained, the plaintiffs seek not to add an additional facility within the scope of Title II but rather to add an activity, *MCAD*, 463 N.E.2d at 1159, and we have been unable to locate any case law suggesting that we construe the reach of Title II so expansively.

The plaintiffs and the dissent, just as the courts in *NOW* and *Power Squadrons*, argue (1) that the term "place" is merely a "term of convenience, not of limitation" and (2) that it would be quite difficult to draft the statute without the word "place." Dissent at 31-32. This argument is likewise unpersuasive for "[t]his court has previously stated that the language of the statute is the most reliable indicator of congressional intent: 'It is that language which is chosen with the most care, subjected to the greatest scrutiny and actually voted on by Congress and signed by the President.' " *United States v. Bell*, 936 F.2d 337, 341 (7th Cir. 1991) (quoting *Monterey Coal Co. v. Federal Mine Safety and Health Review Comm'n*, 743 F.2d 589, 595-96 (7th Cir. 1984)). We fail to understand why the dissent claims that Congress was incapable of drafting the statute without the word "place." Congress could very easily have drafted the statute without using the word "place" and instead written "each of the following, if it serves the public, is a public accommodation within the meaning of this title . . . ," but Congress made a considerate and deliberate choice not to do so. As previously explained, "we must assume Congress understood the meaning of the words it incorporated into the [Act]." *Jones v. Hanley Dawson Cadillac Co.*, 848 F.2d at 807. Congress could likewise have avoided using the word "place" in subsection (b)(3) with the following language "or any other public exhibition or entertainment . . . ." Instead,

Congress included the descriptive term "place" and proceeded to give concrete examples of specific places. It is obvious that the language of the statute reflects Congress' clear intention not to include membership organizations. *See id.*; *see also Richards*, 369 U.S. at 9 ("the legislative purpose is expressed by the ordinary meaning of the words used"). It really isn't very difficult to interpret the true meaning of a statute when one reads the words for their plain and unambiguous meaning.

In an argument not advanced by the plaintiffs, the dissent relies on *Hornick v. Noyes*, 708 F.2d 321 (7th Cir. 1983), *cert. denied*, 465 U.S. 1031 (1984), for the proposition that Title II is applicable to the case before us. In *Hornick*, we held that Title II covers a YWCA that offered both permanent and temporary housing. *Id.* at 324. The dissent somehow twists this holding to mean that Title II regulates every imaginable membership organization. *See* Dissent at 29-30 ("[t]his court has held that the Young Women's Christian Association is covered by Title II"). Just because Title II covers *one* YWCA which provides both permanent and overnight lodging does not *ipso facto* mean *every* YWCA is covered, *much less every membership organization. Hornick* does not even discuss membership, sharply distinguishing it from the case before us.[5] Moreover, the *Hornick* YWCA operated a building that served both as a permanent residence and also as an overnight hotel; this type of facility is expressly covered by Title II. *See* § 2000a(b). The dissent states that the only factor distinguishing *Hornick* from the case before us is that the YWCA "has a set physical location." We are of the belief that this is a significant and telling difference. While we do not dispute the fact that the YMCA, YWCA, (collectively the "Y") and the Boy Scouts share many of the same worthy attributes, *Hornick* clearly contains no precedential value for the case before us

[5] It appears that the YWCA in *Hornick* offered housing to anyone who could pay the rent. *See Hornick*, 708 F.2d at 322-26.

because *Hornick* involved the question of whether the denial of public accommodation in a facility that provided both temporary and permanent housing was proper.

In an attempt to expand the reach of Title II, the dissent contends that we are placing significance on the amount of rent the Boy Scouts pays for facilities it uses. *See* Dissent at 31. We disagree with the dissent's interpretation of our holding, for it is of little significance how much rent is paid by the organization, if any. The key distinction between the the "Y" in *Hornick* and the case before us is the Boy Scouts lack of a close connection to any physical facility. The dissent misinterprets our holding to mean that a "Y" without overnight accommodations may discriminate while one that offers housing may not. Once again, this misses the point. A "Y" that operates a gymnasium with recreational and exercise equipment is also a facility. Without the gymnasium (a facility) the "Y" would be unable to serve its function thus Title II governs that facility. The Boy Scouts organization on the other hand, can and does function apart from any connection to a physical facility. The dissent fails to acknowledge this distinction because it misapprehends the nature of the Scouts. A prospective scout seeks admission into a group of young boys for social interaction, as opposed to entry into a hotel, restaurant or gymnasium. Conversely, a person goes to a "Y" to sleep, reside or exercise. Without the particular facility the individual's purpose would be thwarted.

I agree that Title II applies in the majority of tenancy situations as in *Hornick*, but Title II does not apply to a voluntary membership organization like the Boy Scouts in a factual situation of this nature. The dissent's interpretation of *Hornick* is much too broad and an exchange at oral argument underscores the radical implications of such an interpretation of Title II. The plaintiffs' counsel admitted that his reading of Title II would include an organization that was open to the public but met in a private home. He went so far as to state that his interpretation of the parameters of Title II would require an

organization that studied Israeli culture and history to admit into their group (meeting in a private home) a neonazi who believed in, and was dedicated to, the destruction of Israel. Such absurd results can only be avoided by recognizing that a public accommodation as Congress defined in the statute must "serve the public." 42 U.S.C. § 2000a(b). Although the Boy Scouts organization does own and/or rent buildings used mainly for administrative purposes, this alone falls far short of transforming the Boy Scouts of America into a public accommodation. Thus the plaintiff and the dissent must look elsewhere for support of the argument that membership organizations that do not maintain a close connection to a particular facility to achieve their objectives are subject to Title II.

The dissent also argues that because any member of the particular scout troop is welcome in the private home of the troop leader on the evening of a meeting, for Title II purposes, that private home is no different than a restaurant. I assume the dissent is referring to a restaurant licensed to sell food and beverages, and with that I must take issue because a restaurant is expressly listed as being included within Title II. *See* 42 U.S.C. § 2000(a)(b)(2). The analogy of a private home to a restaurant must also fail for the reason that a private home owner may place many more restrictions on entry into his or her home than may a licensed public restaurant. For example, a parent hosting a Scout meeting certainly has the right to refuse entry into his or her home to any boy who is under the influence of alcohol, drugs, or carrying a weapon because in this country, "a man's home is his castle." *Lombard v. Louisiana*, 373 U.S. 267, 274 (1963); *City of Watseka v. Illinois Pub. Action Council*, 796 F.2d 1547, 1571 (7th Cir. 1986) (Coffey, J., dissenting), *aff'd*, 479 U.S. 1048 (1987).

A private home is not the type of facility governed under Title II, therefore the fact that the Scouts meet in a private home does not transform the Scouting organization into a place of public accommodation. *See* 42 U.S.C. § 2000a. The dissent concedes that the defendant organization is not a public accommodation when he states "the

scout leader must unlock his home to *all qualifying members.*" Dissent at 31 (emphasis added). The requirement of qualification precludes the notion that the troop meeting is open to the public. *More importantly, however, in 42 U.S.C. § 2000a(b)(1), Congress has expressly declared that a private residence in which the homeowner dwells does not become a public accommodation simply because the owner opens it to the public.*[6] In fact, the owner may open his or her home for economic purposes such as a fundraiser for a charitable organization or renting out a room to a student and still not become a public accommodation. Congress, in federal legislation, has excluded from the definition of public accommodation "an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence." 42 U.S.C. § 2000a(b)(1). Based on this statutory language expressing Congress' clear intent to exclude private residences, I fail to understand how one can argue that the Boy Scouts organization becomes subject to the public accommodation statute because it meets in a private residence.

The Welshes and the dissent also maintain that merely because the Scouts move from one location to another is insufficient to exclude the organization from Title II. The dissent analogizes the Scouts to various modes of transportation such as airplanes, buses and trains and to a res-

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[6] The statute provides in part:

"(b) . . . Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title . . . if its operations affect commerce, or if discrimination or segregation by it is supported by State action:

(1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, *other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence* . . . .

42 U.S.C. § 2000a(b)(1).

taurant that transfers its licensed premises to set up a temporary booth in a park during a festival. *See* Dissent at 31. We are not in agreement with this argument. First, the analogy lacks merit because a restaurant is expressly listed in subsection (b)(2) and thus covered by Title II as are forms of transportation under various provisions of the Civil Rights Act, whereas an organization of individuals with a qualified membership such as the Boy Scouts is not covered in Title II. Second, reference to airplanes, buses, trains and restaurants undermines the dissent's argument because each of those is a physical facility or structure whereas the Boy Scouts is a social membership organization and not a physical facility. The dissent goes on to argue that our holding requires the courts to assess a person's motive for joining an organization. This likewise is inaccurate. The question before the court is not "why did a person join?" but rather, "what did the person join?" In the case of the "Y," the Little League, and/or other organizations with a close connection to a physical facility, the person joins an entity that provides access to a recreational or residential facility (i.e., gymnasium, baseball field, housing or meeting hall). In the case of the Boy Scouts, a person joins a membership organization lacking a close connection to any physical facility. Congress made a clear distinction between entities that require a close connection to a particular facility to achieve their objective (such as hotels, restaurants, theatres, and sports arenas) and those that do not require such a connection. We are not at liberty to disregard that distinction. While it is true that "people" and not "places" are the source of discrimination, in Title II Congress focused exclusively on prohibiting discrimination in *places of public accommodation* and not in every conceivable social relationship. In various other legislative enactments, Congress has addressed discrimination in places other than public accommodations such as housing, employment, education, and public transportation. The only question before this court, however, is whether a membership organization such as the Boy Scouts of America is covered by Title II.

Our conclusion that Title II does not govern the Boy Scouts of America is supported by one further rationale. The Boy Scouts, in the operation of the troop, does not require a particular physical facility, for its purpose is to train young boys to respect God, their country and their fellow man, while developing a good moral character. The Boy Scouts is a participative organization, the young boys come to engage in social activity and interact with each other. The dissent counters that "the Scouts do meet in a place; meetings are not held in outer space." Dissent at 30. This assertion by the dissent is nothing but an attempt to expand the reach of Title II. The statute does not govern every imaginable "place," it only regulates public facilities such as motion picture houses, theaters, concert halls, sports arenas, and stadiums. *See* 42 U.S.C. § 2000a(b)(3). Title II was never intended to govern a Boy Scout meeting in a private residence, out in the wilderness, in a church, or in "outer space" as the dissent writes. Thus for the reasons stated we conclude that Title II of the Civil Rights Act of 1964 does not govern membership organizations which do not bear a close connection to a particular "establishment," "place," or "facility".

B. *Private Club Exception*

As explained above, the Boy Scouts organization is excluded from the operation of Title II because subsection (b) does not cover a membership organization whose purpose is not closely connected to a particular facility. The district court declined to extend its analysis beyond this inquiry because it found that "[m]embership organizations *per se*, which do not operate from or supply access to a particular facility or location, do not qualify as 'places of public accommodation' within the meaning of Title II." *Welsh II*, 787 F. Supp. at 1541. Because we conclude that the defendant organization does not constitute a public accommodation, it should be unnecessary to discuss whether it satisfies the private club exception. However, the dissent has argued that the Boys Scouts is not a private club, thus we are compelled to respond to its analysis.

The inquiry into the private club exception involves a consideration of several factors. The Welshes and the Boy Scouts as well as the district court (*Welsh I*) have relied on *Lansdowne Swim Club*, 713 F. Supp. at 796-97, which provides a list of seven factors to weigh in determining whether an entity qualifies as a private club. The seven factors are: (1) the genuine selectivity of the group; (2) the membership's control over the operations of the establishment; (3) the history of the organization; (4) the use of facilities by nonmembers; (5) the club's purpose; (6) whether the club advertises for members; and, (7) whether the club is nonprofit or for profit. *Id.* We, likewise, will examine these factors.

In construing the private club exception of Title II, courts have properly placed great weight on the first factor, that of selectivity. *See, e.g., Tillman v. Wheaton-Haven Rec. Ass'n*, 410 U.S. 431 (1973). The dissent deduces that the Boy Scouts of America is not truly a private club because it has over five million members and advertises for new members through the public school system. This type of analysis casts aside an important aspect of selectivity that the Supreme Court has emphasized. The Supreme Court requires that there be a *"plan or purpose of exclusiveness." Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 236 (1969) (emphasis added). The Court has applied this analysis on several occasions and held that racial discrimination of itself *does not* constitute a "plan or purpose of exclusiveness." For instance, in *Sullivan* the Court determined that a community park permitting only white "members" was not truly private because "[i]t is open to every white person within the geographic area, there being no selective element other than race." *Id.*; *see also Tillman*, 410 U.S. at 438 (denying private club status to nonprofit corporation operating a community swimming pool). In *Daniel*, 395 U.S. 298, the Supreme Court reviewed a whites-only "club" that required a twenty-five cent membership fee and had admitted over 100,000 "members." The Court concluded that the " 'membership' device seems no more than a subterfuge designed

to avoid coverage of [Title II]." *Id.* at 302. Such is not the case of the Boy Scouts. Although the Scouts intentionally admit a large number of boys from diverse backgrounds, admission to membership is not without the exercise of sound discretion and judgment. This is evident from the Constitution and By-laws as well as the Boy Scouts Oath and Scout Law. The Oath reflects the commitment of each member, and has remained unchanged since the publication of the Scouts first handbook in 1911. The Oath reads:

> "On my honor I will do my best to do my duty to God and my country and to obey the Scout law, to help other people at all times, to keep myself physically strong, mentally awake and morally straight."

This Oath offers a clear statement of the beliefs, principles and purpose of the Scouts, i.e., to nurture belief in God, respect for one's country and his fellow man, and being of good moral character. In order to maintain these principles, it is essential that the Scouts exercise selectivity. No one argues that the Oath of membership was adopted as a "subterfuge" to avoid the effects of Title II. Indeed, such an argument would be foolish given the longevity of the Oath. Moreover, the Oath evidences both a *plan* and *purpose* of selectivity. *Sullivan*, 396 U.S. at 236. The distinction between the Scouts' selectivity and that of the park or swimming pool that excludes non-Caucasians is self-evident. The purpose of a swimming pool or tennis court is to allow one to participate in recreation, and both Caucasians and non-Caucasians are capable of swimming and playing tennis. The purpose of Scouting, however, is to equip youth of all races, colors and creeds to fulfill their duty to God, to mature personally, and to help others. This can only be achieved by a boy who believes in God. How does one who denies the very existence of a Supreme Being presuppose to follow the Oath of the Boy Scouts of America? We hold therefore that the Scouts organization not only is selective, but that its very Constitution, By-laws and doctrine dictate that it remain selective.

The importance and longevity of the principles enunciated in the Scout Oath are also dispositive of two other *Lansdowne Swim Club* factors. The fourth factor considers the history of the club. The Scouting organization was founded in 1907 in England. The *Constitution and By-laws of the World Organization of the Scout Movement* contain three tenets: duty to God, duty to one's fellow man, and duty to oneself. *Welsh II*, 787 F. Supp. at 1515. The *Constitution* requires all members to adhere to the Scout Oath and to the Scout Law. Based on well-reasoned precedent, we refuse to construe Title II to require that an organization such as the Boy Scouts of America abandon its principles which have stood the test of time, having endured for more than eighty some odd years. The very purpose of the private club exception is to preserve the right of truly private organizations to maintain their unique existence.

The fifth factor addresses the purpose of the organization's existence. As previously discussed, the purpose of the Scouts is to train young boys to live according to the principles of duty to God, duty to others, and duty to oneself. The Boy Scouts of America would be unable to carry out its very purpose if the government, through Title II, required it to accept members who deny a condition of membership, that is, the belief in God. Finally, the seventh *Lansdowne Swim Club* factor also favors the private club status of the Scouts: they are a nonprofit organization. Thus four of the seven *Lansdowne Swim Club* factors strongly support the conclusion that the Boy Scouts indeed is a private club entitled to exception from Title II.

The dissent concludes that because the Boy Scouts have five million members, and are open to "as many boys as will join,"[7] it is neither selective nor private. Dissent at

[7] The dissent is mistaken on this point. As previously explained, the Boy Scouts exercises discretion in its membership selection. If the organization was open to "as many boys as will join," it would not have excluded the plaintiffs and this lawsuit would never

(Footnote continued on following page)

34. This conclusion not only exaggerates the facts, it ignores the purpose of the Scouts' existence and punishes the Boy Scouts for its success in recruiting future quality leaders of society. Certainly Congress did not intend to condition the private club exclusion from Title II on the popularity of the organization. The more pertinent factor regarding selectivity is the nexus between the organization's purpose and its membership requirements. Even if we were to agree for the purpose of argument that the Boy Scouts of America is a public accommodation, the law is most clear that it is entitled to exemption from Title II because it is a private club.

Obviously the discussion of the Boy Scouts' purpose and its right to determine whom to admit into membership impacts a constitutional right to Freedom of Association. However, because we decide this matter on the statutory grounds, we need not, and indeed should not, address the constitutional questions presented. "Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the court will decide only the latter." *Indiana Port Comm'n v. Bethlehem Steel Corp.*, 835 F.2d 1207, 1210 (7th Cir. 1987) (quoting *Ashwander v. Valley Authority*, 297 U.S. 288, 347 (1936)).[8]

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[7] *continued*
have been filed. In fact the very flyer the dissent relies upon to support its argument states:

> "One goal of the Tiger Cubs, BSA, is for you and your boy to have fun together. Another is to strengthen bonds within the family. Ideals such as personal fitness, reverence for God, love of country, and caring for others are also part of the program."

[8] The dissent also points out that the plaintiffs' lack of belief in a Supreme Being does not exclude them from Title II's prohibition against religious discrimination and that the defendant organization is subject to Title II because its activities affect commerce. *See* Dissent at 26-27. Because of our holding that the defendant organization is not a "place of public accommodation," it is unnecessary to address First Amendment Freedom of Religion or the Commerce Clause.

III. *CONCLUSION*

We hold that Title II does not apply to the Scouting organization because it is not an "establishment" that "serves the public," thus it is not a "place of public accommodation." Likewise, the Boy Scouts does not constitute a "place of exhibition or entertainment" in the sense Congress envisioned when drafting Title II. Man is a human being who has a sociological need to join with others in order to develop his full being and to fulfill his need for companionship as well as enjoyment. Congress, in drafting Title II certainly did not intend to interfere with the development of the whole man.

Even if we were to agree for the purpose of argument that the Boy Scouts is a public accommodation, Congress expressly excluded private clubs such as the Scouts from the operation of the statute. The Boy Scouts of America qualify as a private club because its Constitution and Oath contain requirements that serve to purposefully exclude nonqualifying applicants. Because this dispute may properly be resolved on statutory grounds, there is absolutely no need to address the constitutional issues. *Ashwander*, 297 U.S. at 347; *Indiana Port Comm'n*, 835 F.2d at 1210.

A great deal is at stake in the interpretation of statutes such as Title II. The Founding Fathers recognized that a republic cannot endure without a virtuous citizenry. Successful self-government requires that citizens willingly participate in public affairs, make sacrifices for the common good, curb their selfishness, and join in taking responsibility for themselves and others. The central question for those concerned about maintaining the health of our republic must be, "how do individuals acquire the virtues necessary for self-government?" History provides only one answer: through the institutions of civil society, like the family, religious groups, and voluntary associations, which inculcate a sense of moral values in the young. Throughout its eighty-six years of existence, the Boy Scouts have successfully presented its combination of educational, social,

athletic, craft, wilderness training and outdoor activities to our young people. The leadership of many in our government is a testimonial to the success of Boy Scout activities. In recent years, single parent families, gang activity, availability of drugs and other factors have increased the dire need for support structures like the Scouts. When the government, in this instance through the courts, seeks to regulate the membership of an organization like the Boy Scouts in a way that scuttles its founding principles, we run the risk of undermining one of the seedbeds of virtue that cultivate the sorts of citizens our nation so desperately needs. Such a momentous and potentially costly a decision should be made by the people's elected representatives, the U.S. Congress, only after thoughtful deliberation, consideration and debate about its consequences. It is a decision to be made in the legislative halls and not by the judicial branch of government.

It is interesting to note that the challenged Boy Scout Oath is strikingly similar to the one expressed by our Founding Fathers on July 4, 1776 in the Declaration of Independence which reads in part "And for the support of this Declaration, with a firm reliance on the protection of Divine Providence, we mutually pledge to each other our Lives, our Fortunes and our sacred Honor." Certainly this Court must not upset such enduring principles by stretching beyond recognition a statute drafted to guarantee equal access to public facilities.

AFFIRMED.

CUMMINGS, *Circuit Judge*, dissenting. As everyone (or almost everyone) knows, Boy Scouts must be trustworthy, loyal, helpful, friendly, courteous, kind, obedient, cheerful, thrifty, brave, clean and reverent. They must also, according to the organization's constitution and by-laws, believe in God. This last requirement leaves out a seven-year old from Hinsdale, Illinois named Mark Welsh who wanted to join the Tiger Cubs but who, along with his father Elliott Welsh, refuses to recite an oath pledging allegiance to a Supreme Being. The question in this case, then, involves a membership organization's power to draw a circle around itself that excludes atheists and agnostics. Although the majority opinion arguably reaches the correct result, I believe it does so in a most unfortunate fashion: by imparting a stingy and narrow reading to the remedial statute at issue, Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a ("Title II"). The majority's interpretation of Title II would leave the Boy Scouts and other like organizations free to discriminate not just against atheists—or those whose beliefs arguably conflict with the group's most central philosophy—but against anyone at all on sheer whim. Under the majority's analysis, a group such as Rotary International or the Jaycees or Little League is, absent a more comprehensive state statute, perfectly free to exclude blacks, Jews, Catholics, etc. Rather than unduly narrow the reach of Title II, I would hold that the statute does prevent discrimination by membership organizations. This does not necessarily mean that the Boy Scouts could be forced to admit atheists, however, because the First Amendment protects organizations from having to accept those who do not share its most elementary beliefs.[1] Yet the

[1] Curiously, the district court wrote two lengthy and strongly worded, even passionate, opinions which come to completely opposite conclusions. At the pre-trial stage the judge found as a preliminary matter that "case law makes it clear that Title II does apply to membership organizations," that defendants satisfy the "place of public accommodation" clause, and that the Boy Scouts are subject to the anti-discrimination provisions of Title II. 742

(Footnote continued on following page)

majority never reaches the constitutional question because of its treatment of Title II. As a result, I dissent.[2]

Title II holds that "All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin." 42 U.S.C. § 2000a(a).[3] Included in the definition of public accommodations are "place[s] of * * * entertainment," 42 U.S.C. § 2000a(b)(3), a definition I believe encompasses membership organizations including the Boy Scouts.

Before turning to the majority's analysis, it is worth noting the arguments that have *not* been offered to justify this discrimination against atheists. No one has suggested, for example, that non-believers are not protected under Title II's ban on religious discrimination. Indeed, the Supreme Court has held that:

> the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all. This conclusion derives support * * * from recognition of the fact that the political interest in forestalling intolerance extends be-

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[1] *continued*

F. Supp. 1413, 1422 (N.D.Ill. 1990). Nearly two years later, after a bench trial, the district court found that the Scouts do not qualify as a place of public accommodation under the statute because "they do not operate from or avail their members of access to a particular facility or location." 787 F. Supp. 1511, 1541 (N.D.Ill. 1992). Since this case involves primarily legal not factual questions, it is unclear what occurred during the trial to cause such a remarkable change in the district court's reasoning.

[2] This dissent disagrees with the "place" analysis in the majority opinion but does not disturb the result reached in the district court.

[3] Since Title II does not address sexual discrimination, the result I advocate would not force the Scouts to admit females.

> yond intolerance among Christian sects—or even intolerance among "religions"—to encompass intolerance of the disbeliever and the uncertain.

Wallace v. Jaffree, 472 U.S. 38, 53-54. Nor does the majority argue that Scouting operations do not affect commerce and so may not be regulated by the federal government. As the district court observed, the Boy Scouts supplied $13 million worth of uniforms, publications and other paraphernalia in one recent year, much of which moved in interstate commerce (including a Tiger Scout T-shirt and Scout leader's cap mailed to the Welshes through a J.C. Penney catalog). *Welsh v. Boy Scouts of America*, 787 F. Supp. 1511, 1520-1521 (N.D.Ill. 1992). This is enough of a tie to interstate commerce under the Supreme Court's generous definition of the term. See *Wickard v. Filburn*, 317 U.S. 111; *Katzenbach v. McClung*, 379 U.S. 294.

As I understand the majority's analysis, there are four reasons why the Scouts are not covered by Title II. The first is that the statute, which delineates a series of establishments to be regulated (fifteen examples are given) and makes no mention of either the Boy Scouts or membership organizations, should be read as evidence of congressional intent to exclude rather than to include. With all respect, this substitutes the conclusion for the analysis. Of course the statute does not say "Boy Scouts"—if it did this case would be easy. The case is hard because the law is ambiguous and the precise question we must decide, which the majority manages to avoid by talking about "plain language," is whether the phrase "place of * * * entertainment" includes membership organizations; that the rest of Title II is silent with respect to Boy Scout-like organizations hardly seems relevant.

The majority's second argument rests on the absence of case law, and Judge Coffey faults me for failing to find any federal appellate decision holding that a membership organization is covered by Title II. True enough. But neither has the majority pointed to any federal appellate decision holding that a membership organization is not covered. This proves only that the issue has not come up

before; it gives no clues as to its proper resolution. In this case, a tie may well go to the plaintiff since we have been repeatedly instructed by the Supreme Court to interpret the statute liberally. *Daniel v. Paul*, 395 U.S. 298, 308; *Miller v. Amusement Enterprises, Inc.*, 394 F.2d 342, 349 (5th Cir. 1968) (en banc). In *Roberts v. United States Jaycees*, 468 U.S. 609, for example, a case not mentioned by the majority, the Supreme Court upheld the application of a Minnesota statute nearly identical to Title II to the Jaycees, although the Court was not called on to interpret the statute.[4] And in *Board of Directors of Rotary Intern. v. Rotary Club of Duarte*, 481 U.S. 537, also not mentioned by the majority, the Court held that Rotary International must admit women as members under a broadly written California law.[5] Again, the Court did not have to interpret the statute, but Justice Powell's opinion for the Court emphasized that "public accommodations laws 'plainly serv[e] compelling state interests of the highest order,' " *id.* at 549 (quoting *Roberts*, 468 U.S at 624), and said that "[i]n *Roberts* we recognized that the State's compelling interest in assuring equal access to women extends to the acquisition of leadership skills and business con-

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[4] The Minnesota public accommodations law provided:

> It is an unfair discriminatory practice:
>
> To deny any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of race, color, creed, religion, disability, national origin or sex.

Roberts, 468 U.S. at 615 (quoting MINN. STAT. § 363.03, subd. 3 (1982)).

[5] The California Act provides in part:

> All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

Rotary, 481 U.S. at 541-542 n.2 (quoting Cal. Civ. Code Ann. § 51 (West 1982)).

tacts as well as tangible goods and services." *Id.*; see also *New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1 (upholding state public accommodation laws' application to private clubs). Although these cases did not involve Title II, the Court clearly signalled that public accommodation statutes generally are to be interpreted broadly.[6]

The majority's third and meatiest argument is that the Boy Scouts cannot qualify as a "place of * * * entertainment" because they are not a "place." This reasoning has a kind of facial, common sense appeal, but it simply cannot stand up under serious scrutiny. This Court has held that the Young Women's Christian Association is covered

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[6] A number of state courts and district courts interpreting state laws have considered the meaning of "place" in public accommodation statutes. See, *e.g.*, *National Organization for Women, Essex County Chapter v. Little League Baseball, Inc.*, 318 A.2d 33 (N.J. Super. 1974), affirmed, 338 A.2d 198 (little league baseball is "place of accommodation"); *United States v. Slidell Youth Football Ass'n*, 387 F. Supp. 474 (E.D.La. 1974) (football league is "place of accommodation"); *Quinnipiac Council, Boy Scouts of America, Inc. v. Commission on Human Rights and Opportunities*, 528 A.2d 352 (Conn. 1987) (Boy Scout organization is "place of accommodation"); but *cf.*, *United States Jaycees v. Massachusetts Commission Against Discrimination*, 463 N.E.2d 1151 (1984) (Jaycees organization is not "place of accommodation"); *Kiwanis Intern. v. Ridgewood Kiwanis Club*, 806 F.2d 468 (3d Cir. 1986), certiorari dismissed, 483 U.S. 1050 (Kiwanis organization is not "place of accommodation"). Since these cases are not binding, they need not be discussed in detail.

In addition, the latest public accommodation statute, found in the 1990 Americans With Disabilities Act, includes an expanded number of establishments in its definition of "places" of public accommodation. See 42 U.S.C. § 12181. This latest example of congressional drafting does not reveal whether the Boy Scouts meet at a "place" under Title II any more than do the Supreme Court's decisions in *Roberts* and *Rotary*. However, it is instructive that in the ADA Congress has taken note of the broader interpretations given Title II in many courts and seemingly approved the thrust of this case law by offering its own expanded definition of public accommodations.

by Title II. *Hornick v. Noyes*, 708 F.2d 321 (1983), certiorari denied, 465 U.S. 1031 (citing *Nesmith v. YMCA of Raleigh, N.C.*, 397 F.2d 96 (4th Cir. 1968) and *Stout v. YMCA of Bessemer, Ala.*, 404 F.2d 687 (5th Cir. 1968)). The majority contends that the key distinction between the Scouts and the Young Women's or Young Men's Christian Association (collectively the "Y") is that the Y sometimes offers overnight accommodations and is much closer to the paradigmatic motel or restaurant covered by Title II. Yet Hornick did not emphasize this point and, indeed, there are many Y's that do not rent rooms by the night or serve food to the public. It is absurd to suggest that these Y's are free to violate Title II, or that the Y, though prohibited from discriminating in its overnight accommodations, could restrict access to its other facilities on the basis of race, religion, creed or national origin.

It should be incumbent on the majority to explain why our decision in *Hornick* does not dictate the same result in the case of the Boy Scouts, since the Y is also a membership organization. Admittedly, the Y has a set physical location. It owns a building and is a "place" as the word is commonly used. But of course the Scouts also meet in a place; meetings are not held in outer space (a place in its own right). The Scouts may not own the places at which they meet, yet a party's lack of ownership does not exempt an establishment from Title II. See, *e.g.*, *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (motel is covered under Act without regard to ownership of property). Nor can it be significant that younger groups of Scouts may meet in private homes (but not always—monthly meetings are held in church basements and civic halls for which, presumably, rent has sometimes been paid). Since there is no talismanic significance to a house as opposed to a stand-alone commercial property—after all, restaurants operating out of the chef's home are not free to discriminate because the proprietor lives upstairs—this argument must rest on the fact that no rent is paid. The significance of this distinction completely eludes me.

The concern about rent appears to be directed at a deeper and more legitimate concern: *i.e.*, that the homes of Scout leaders are not truly open to the public in the same sense as, say, a shoe store. Yet a boy who belongs to a Scout den is, in fact, free to enter the Scout leader's home on the night of the meeting. In other words, a house where a troop meeting is held ceases to be a private dwelling; for that limited time, the house is as open to the public as the Scout organization itself. Just as a restaurant need not admit customers when the "closed" sign is hanging in the window, but must admit all customers when the "open" sign is displayed, so too must the Scout leader unlock his home to all qualifying members.

Another possible difference between the Scouts and the Y is that the Scouts move from one "place" to another. Yet to read the statute to require a fixed locale would exclude trains, buses, airplanes, traveling circuses—or anything that doesn't have pilings driven into the earth. Under this interpretation, a restaurant that sets up a booth in the park during a festival would be privileged to deny service to people based on skin color. This cannot be so. The majority eventually rests on the notion that people join the Y to use its facilities while children become Boy Scouts for "social interaction." According to the majority, "[t]he key distinction between the Y in *Hornick* and the case before us is the Boy Scouts lack of a close connection to any physical facility." The problem with this analysis is that courts are not in a position to figure out the motives of those who join organizations; that is, whether they belong only to use facilities or whether they seek social connections. Many people not otherwise given to exercise, for example, join the Y precisely because it is a center of social and business interaction. And what would the majority make of the motives of youngsters who enter Little League? That organization has no set location, like the Boy Scouts, and children benefit from the same kind of social interaction that binds the Scouts. But Little Leaguers need a facility too—baseball is not much of a game without a diamond.

In short, even assuming that the word "place" has the critical status and limiting importance in Title II suggested by the majority, I cannot identify a principled distinction between membership organizations such as the Boy Scouts that meet in varying locales and other organizations that use or own one facility. The word "place" simply cannot bear the stress that has been heaped on it by the majority. That Title II should turn on the definition of "place" is irrational because places do not discriminate; people who own and operate places do. And there is no basis to believe that those who operate facilities at fixed locales, as opposed to those who operate membership organizations from varying locales, are more deserving targets of civil rights regulation. To put so much emphasis on this one word in isolation is to fall into the trap we recently warned against in *Herrmann v. Cencom Cable Associates, Inc.*:

> Statutes have meanings, sometimes even "plain" ones, but these do not spring directly from the page. Words are arbitrary signs, having meaning only to the extent writers and readers share an understanding. * * * Language in general, and legislation in particular, is a social enterprise to which both speakers and listeners contribute, drawing on background understandings and the structure and circumstances of the utterance. Slicing a statute into phrases while ignoring their contexts—the surrounding words, the setting of the enactment, the function a phrase serves in the statutory structure—is a formula for disaster.

978 F.2d 978, 982 (1992). The more logical and contextual reading of Title II is that "place" is a mere "term of convenience, not of limitation," because the word as it is commonly used does encompass most of what is open to the public. *National Org. for Women, Essex County Chapter v. Little League Baseball, Inc.*, 318 A.2d 33, 37 (N.J.App. 1974), affirmed, 338 A.2d 198. The difficulty of drafting a statute without resort to the term "place" is obvious if one tries to find a suitable substitute in such phrases

as "place of accommodation" and "place of * * * entertainment."

The impetus behind Title II was to aid the black traveler in the South for whom "the road may be more like a desert and each inviting sign a mirage or, worse yet, a humiliating rebuff to him, his family or companions," *Welsh*, 787 F. Supp. at 1535 (quoting 110 Cong.Rec. 1642 (February 1, 1964) (remarks of Rep. Ryan)). But it is also clear that Congress targeted discrimination well beyond that suffered by African Americans moving in inhospitable territories. Lawmakers sought to eradicate discrimination in all things open and available to the general population. The meaning, if not the language, of Title II is simple and unambiguous enough: if it is open to the public, it must be open to all the public.

The majority's final argument is that even if the Scouts are a "place" covered by Title II, they are exempt under the statute's exception for private clubs. Yet the majority is clearly swimming upstream in suggesting that an organization of five million people in the United States alone may qualify as a private club. There is no single test to determine whether a club or organization is private. *Nesmith*, 397 F.2d at 101. Courts look at many factors including an organization's size, the open-ended character of its membership rolls, its history, and its selectiveness, *United States v. Lansdowne Swim Club*, 894 F.2d 83, 85-86 (3rd Cir. 1990); *Wright v. Salisbury Club, Ltd.*, 632 F.2d 309, 312-313 (4th Cir. 1980); *Nesmith*, 397 F.2d at 101-102, and judges must be skeptical in evaluating claims of private club status. See *Tillman v. Wheaton-Haven Recreation Ass'n, Inc.*, 410 U.S. 431, 438 (swimming and recreational club is not private because membership is open to all whites in geographic area, despite membership cap and required approval of new applicants by existing members); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 236 (hunting establishment is not private because it has "no plan or purpose of exclusiveness"); *Daniel*, 395 U.S. at 302 (recreational facili-

ty could not claim private status despite charging a membership fee).

Though there are no allegations in this case that the Scouts concocted requirements to avoid the civil rights laws as in *Daniel*, 395 U.S. at 302, the organization has few features that would mark it as a private club. Membership is not selective. Any child of the appropriate age (and of course sex) with a parent's permission can join so long as he is willing to recite an oath, pay a small fee, and pledge to attend meetings. As the flyer that sparked Mark Welsh's interest in the Scouts stated flatly, "YOU CAN JOIN TIGER CUBS, BSA, IF YOU ARE IN THE FIRST GRADE." There is no limit on the number of boys who may join, unlike *Tillman* where the organization did offer a fixed number of memberships and still did not qualify as a private club. 410 U.S. at 438. In fact, the Scouts advertise for new members. See *Wright*, 632 F.2d at 312 (active solicitation of members belies private club claim). Other than the mention of God in the oath, which must exclude an extremely small—though indeterminate—number of children, the only substantive requirement for membership is age, which is not so much a matter of selectivity as a basic common denominator. Age is similar to the geographic requirement in *Tillman*, 410 U.S. at 438, and *Sullivan*, 396 U.S. at 236, that did not convert those associations into private clubs. Since the Boy Scouts have five million members in the United States and are committed to admitting as many boys as will join, the Scouts cannot be considered either selective or private. The majority's expansion of this exception is too extreme to be acceptable.

Though I believe the Boy Scouts are covered by Title II, the inquiry should not end there because the First Amendment protects groups from having to admit those who do not share their most fundamental beliefs. The right of association is among the most precious of liberties guarded by the Bill of Rights, *United Mine Workers of America, District 12 v. Illinois State Bar Ass'n*, 389 U.S. 217, 222; *De Jonge v. Oregon*, 299 U.S. 353, 364. In

my opinion, the majority erred in failing to reach this constitutional issue.

My inclination would have been to hold that the Scouts could exclude atheists under a line of free association decisions suggesting that individuals may form groups in the pursuit of political, social, economic, educational, religious and cultural ends. *Roberts*, 468 U.S. at 622. See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907. "[B]y collective effort individuals can make their views known, when, individually, their voices would be faint or lost." *Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley*, 454 U.S. 290, 294. The Scouts would suffer just the type of injury the First Amendment was designed to prevent if forced to admit members who refuse to subscribe to the organization's basic philosophy. This is so for three reasons. First, the reference to God in Scouting tradition is reflected in a series of oaths—the most basic expression of a group's principles. If anything should receive First Amendment protection, it is an oft-recited statement that reflects values deeply embedded in the organization.[7] Second, the references to God in the Scout oaths seemingly are not proxies for a deeper and more base desire to exclude those who are different or threatening. The Boy Scout oath has since its inception eighty years ago included an affirmance of duty to God—unlike, for example, the Pledge of Allegiance, which garnered its reference to God in 1954. Act of June 14, 1954, ch. 297, 68 Stat. 294 (codified at 36 U.S.C. § 172). The Boy Scout oath is so central that former Scouts, years after they have forgotten how to tie a knot or start a

[7] *Bryant v. Zimmerman*, 278 U.S. 63, is inapposite. That case upheld a New York statute requiring any incorporated association which demanded an oath as a condition of membership to, among other things, disclose its membership. However, the statute in *Bryant* was directed at the Ku Klux Klan and the decision was "based on the particular character of the Klan's activities, involving acts of unlawful intimidation and violence." *NAACP v. Button*, 357 U.S. 415, 465.

fire with scraps of wood, can still recite its lines from memory. Third, there are genuine differences of belief between those who do not believe in God's existence and those who do; these differences are basic enough that a group may choose to define itself in some measure by this distinction. In this sense, the discrimination by the Scouts against atheists is less heinous than the unexamined sexual stereotypes behind the exclusion of women from the Jaycees in *Roberts* and from Rotary International in *Rotary*.

Because the Boy Scouts are not religious in any real sense, however, and belief in God is at best implicit in most Scouting activities, this case presents a particularly vexing challenge to the rights of free association. This is especially so after the Supreme Court's decisions in *Roberts* and *Rotary*, which undertook a searching and not terribly deferential review of the justifications organizations use to limit membership. I regret that the majority has avoided grappling with these issues, and particularly regret that it has done so by unduly constricting the reach of a remedial civil rights statute: Title II. For these reasons, I must respectfully dissent.

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APPENDIX B

IN THE

United States District Court for the Northern District of Illinois Eastern Division

MARK G.A. WELSH, a minor, and Elliott A. Welsh, his father and next friend,

Plaintiffs,

v.

Case No. 90 C 1671

BOY SCOUTS OF AMERICA and BOY SCOUTS OF AMERICA WEST SUBURBAN COUNCIL #147,

Defendants.

MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

This case comes before the Court after trial and on the parties' post-trial proposed findings of fact and memoranda of law. The issue posed is whether the Boy Scouts of America properly may exclude from membership persons who are unwilling to profess a belief in and duty to a supreme being under Title II of the Civil Rights Act of 1964, which prohibits places of public accommodation from discriminating on the basis of religion. Upon review of the statute and consideration of the evidence presented at trial, the Court concludes that the Boy Scouts of America does not qualify as a "place of public accommodation" within the reach of Title II. Accordingly, the Court enters final judgment in favor of the defendants on both counts of the amended complaint.

II. BACKGROUND

Plaintiffs Mark G.A. Welsh and his father, Elliott A. Welsh, have sued the Boy Scouts of America ("BSA") and the Boy Scouts of America West Suburban Council No. 147 (the statute;"Council")—collectively, the "Boy Scouts"—under Title II of

NOTE:

Pages beyond this point are numbered with C-3, etc., but are actually part of Appendix B. Although there is also an Appendix C, the information is different.

the Civil Rights Act of 1964, 42 U.S.C. s 2000a et seq. ("Title II"). The Boy Scouts has refused to admit Mark into its "Tiger Cub" and "Cub Scout" programs because Mark is unwilling to subscribe to a duty to God. Plaintiffs maintain that the Boy Scouts constitutes a place of public accommodation under Title II because its emphasis upon recreational and fun activity renders it a "place of entertainment" within the scope of the if true, the organization cannot discriminate on the basis of religion and exclude atheists and agnostics. Plaintiffs' complaint asks the Court to enter an injunction barring BSA from excluding individuals who do not believe in a supreme being and requiring the Council to admit Mark Welsh as a youth member and his father as his adult partner. The Boy Scouts argues that (1) it does not qualify as a "place of public accommodation" within the coverage of Title II; (2) that even if Title II does apply, the Boy Scouts falls within the private club exemption to the statute's strictures; and (3) that requiring the Boy Scouts to admit individuals unwilling to profess a belief in God would infringe upon the rights of intimate and expressive association which its members enjoy under the First Amendment.

Defendants moved to dismiss the complaint at the outset of the litigation, raising each of the arguments set forth above. The Court denied that motion in a memorandum opinion dated August 9, 1990. Welsh v. Boy Scouts of America, 742 F.Supp. 1413 (N.D.Ill.1990) (Rovner, J.). In that opinion, the Court rejected the Boy Scouts' argument that it could not, as a matter of law, be deemed a "place of public accommodation" within the scope of Title II. 742 F.Supp. at 1421, 1423.[1] The Court also declined to find, as a matter of law, that the Boy Scouts involves relationships so personal that the forced admission of atheist or agnostic individuals pursuant to Title II would violate the First Amendment right of intimate association. Id. at 1430. Similarly, the Court declined to rule as a matter of law that the admission of such individuals would interfere with the First Amendment right of expressive association or the right to free exercise

[1]The Court also rejected the contention that because Congress had granted a federal charter to the Boy Scouts, it necessarily had sanctioned the exclusion of persons who did not concur in the organization's religious principles.742F.Supp.at1423-24.

of religion. Id. at 1435, 1436. The Court reiterated in the conclusion of its opinion that the Boy Scouts' defenses implicated questions of fact which could not be resolved on the complaint alone. Id. at 1436.

After the parties completed their discovery, plaintiffs moved for summary judgment or, in the alternative, for partial summary judgment finding that they had established a prima facie case of cognizable discrimination under Title II. The Boy Scouts did not file its own motion for summary judgment. Essentially, plaintiffs argued that the undisputed facts established the inverse of each of the arguments defendants had raised in seeking dismissal of the complaint, i.e., that the Boy Scouts was in fact a place of public accommodation, that it did not qualify for the private club exemption to the statute, and that application of Title II to the organization would not impermissibly infringe upon the rights of intimate and expressive association. The Court rejected these arguments as well, concluding that fundamental disputes as to the true nature of the Boy Scouts precluded summary judgment on any aspect of the case:

[T]his case is to a great extent one about the Boy Scouts' nature, its conduct, its true purposes, and its methods of achieving them. Only in resolving these factual questions can the Court decide the particular issues posed by this suit: Is the Boy Scouts a public accommodation subject to the provisions of Title II? Is it by nature so private that it may be deemed exempt from the statute? Is the nature of the association among its members sufficiently intimate or expressive that the admission of agnostics or atheists would intrude upon the members' First Amendment freedoms? In part, these are legal inquiries guided by a substantial body of case law. See Welsh, 742 F.Supp. 1413. At the same time, however, their determination requires a decision as to which evidence to credit—a decision which generally must be reserved for trial. Plaintiffs, for example, rely upon evidence (much of it drawn from Boy Scouts literature) which emphasizes the fun, recreational aspects of the Boy Scouts. Based upon this evidence, they argue that the organization furnishes entertainment and thus qualifies as a public accommodation. Defendants, on the other hand, point to evidence which indicates that the recreational aspects of the Boy Scouts must be viewed simply as a means to an end—the

instillment of important social values in male youths. Whose view of the Boy Scouts is correct, and where the organization fits on the spectrum of institutions to which Title II may or may not apply, cannot be resolved upon a cold record. The literature, affidavits, and deposition testimony which the parties have submitted to the Court adequately support their respective views of the Boy Scouts; but only in hearing live testimony, tested by cross-examination, can the Court finally decide whose view to credit.

Welsh v. Boy Scouts of America, No. 90 C 1671, Mem.Op. at 8-9, 1991 U.S. Dist. LEXIS 5979, 1991 WL 78179 (N.D.Ill. May 3, 1991) (Rovner, J.). The case proceededto trial on June 10, 1991, and the Court heard testimony over the course of six days. At the conclusion of the trial, the Court requested the parties to submit revised proposed findings of fact as well as post-trial memoranda. The post-trial briefing was completed on August 23,1991

The case is now ripe for final decision from the Court. Having heard and reviewed the evidence presented at trial, having considered the express provisions of Title II, and having carefully reviewed once again the case law applying the federal statute and comparable state provisions, the Court finds the case to be resolved on the threshold question of whether the Boy Scouts constitutes a place of public accommodation as that term is defined in the statute. Based upon the evidence which reveals the Boy Scouts to be a membership organization whose benefits flow primarily, if not exclusively, from the interpersonal associations among its membersrather than from a tangible facility or "source of entertainment" which has moved in interstate commerce, the Court concludes that the Boy Scouts does not constitute a "place of entertainment" within the scope of Title II's prohibition of discrimination in places of public accommodation.

III. FACTS

A. Stipulated Facts

The parties have stipulated to a number of background facts regarding the nature of the Boy Scouts and the events and policies which led to this litigation. These are summarized below and, pursuant to the parties' stipulation, the Court includes them among its

findings of fact. See Stephenson v. United States, 771 F.2d 1105, 1107 (7th Cir.1985)[2]

1. Plaintiff Mark Welsh is the minor child of plaintiff Elliott A. Welsh and Donna Arsenoff. He lives with his parents in Hinsdale, Illinois. At the time this litigation was instituted, Mark was seven years old, was in the first grade, and desired to join a Tiger Cub Group.

2. Elliott Welsh is a resident of Hinsdale, Illinois. At the time this litigation was instituted, Elliott Welsh desired to join a Tiger Cub Group as his son's adult partner.

3. Boy Scouts of America ("BSA") is a congressionally chartered corporation, pursuant to 36 U.S.C. ss 21-29, offering the Tiger Cub, Cub Scout, Boy Scout and Explorer programs to its membership.

4. The West Suburban Council Boy Scouts of America ("West Suburban Council") is a not-for-profit Illinois corporation, chartered by BSA to make sure that the general principles of advancement are understood and carried out in the local area, to make Scout training available, and to supervise member groups in such a way as to ensure strict adherence to BSA requirements and standards. Pack 56 in Burr Ridge, Illinois is one of the Scouting groups supervised by the West Suburban Council. Hinsdale and Burr Ridge, Illinois are within the jurisdiction of the United States District Court for the Northern District of Illinois.

5. BSA is part of the world-wide Scout movement founded by Robert Baden-Powell in England in 1907. The World Organization of the Scout Movement was established in 1922. The World Organization now involves national organizations in approximately 130 countries, including BSA, all of which agree to follow and are

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[2]Because the Court's disposition of the case rests upon the threshold question of whether or not the Boy Scouts constitutes a place of public accommodation as defined by Title II, facts to which the parties have stipulated but which the Court finds immaterial to this issue have not been incorporated into the Court's findings.

Certain of the stipulated facts have also been reordered by the Court and renumbered accordingly.

In some instances, defendants have stipulated to a particular fact but have contended the fact is irrelevant to the issues posed in the case. To the extent any of these facts have been included in the Court's findings, the relevance objections are overruled.

governed by the Constitution and By-laws of the World Organization of the Scout Movement.

6. The Constitution and By-Laws of the World Organization of the Scout Movement sets forth the three principles of duty to God, duty to others, and duty to self to which all members world-wide adhere. The Constitution requires all members to adhere to a Scout Promise and Scout Law which reflect these principles.

7. BSA requires as a condition of membership that all applicants recognize a duty to God.

8. Scouting is conducted through Scout packs, troops, and posts.

9. Each pack, troop, post, and local council is self-financed and is governed by the Constitution and By-laws of the World Organization of the Scout Movement and the Rules and Regulations of the Boy Scouts of America.

10. BSA is a bona fide non-profit organization. Its volunteer leaders serve without compensation or material reward of any kind.

11. BSA was incorporated in the District of Columbia in 1910 and published its first Handbook in 1911. The BSA Scout Oath or Promise for Boy Scouts has remained unchanged from that date:

On my honor I will do my best to do my duty to God and my country and to obey the Scout Law, to help other people at all times, to keep myself physically strong, mentally awake and morally straight.

12. BSA's Scout Law provides:

A Scout is: ... Trustworthy... Loyal... Helpful... Friendly... Courteous... Kind... Obedient... Cheerful... Thrifty...Brave... Clean... Reverent.

13. BSA is divided into geographic regions. BSA charters local councils, which are separate not-for-profit corporations, to further Scouting in a given geographic area. Local councils are divided into districts. Districts are overseen by a volunteer committee. The principal duty of each district is to work with sponsoring groups in organizing and supporting packs, troops, and posts. BSA charters sponsoring groups to maintain packs, troops, or posts.

14. Every sponsoring organization appoints one delegate to a local council, which elects an executive board. Each local council has at least three delegates to the National Council. The National Council

elects the National Executive Board which sets national policy for BSA. The National Council) furthers Scouting nationally.

15. Each council also employs a small number of professional Scouters to advise and guide its volunteers. For example, West Suburban Council employs approximately six professionals for its approximately 1,600 volunteer leaders.

16. The sponsoring group is charged with providing suitable facilities for meetings and activities, adult leaders, and a Chartered Organization Representative who acts as liaison between the sponsoring group and the pack. The adult leaders are all volunteers who register as members of BSA.

17. Cub Scouting was created as an outgrowth of the Boy Scouting program and became a permanent program of BSA in 1930.

18. In order to become a Cub Scout, a boy must meet the following membership requirements. The boy must have completed first grade or be between the ages of seven and ten years old; he must have the written consent of his parent or guardian; he must register and pay the national registration fee; and he must complete the Cub Scout Application. In completing the Cub Scout Application, the boy signs a pledge which shows he has read the Cub Scout Promise and Law of the Pack and promises to do his best to live up to them. He also promises to attend regularly the meetings of his den and pack.

19. In addition, the parent of a prospective Cub Scout must sign the boy's application, indicating that the parent agrees to help with the boy's advancement, to participate in other den and pack activities, to attend monthly pack meetings, and to assist den and pack leaders.

20. It is the leader's responsibility to teach each boy the Cub Scout ideals, as expressed in the Cub Scout Promise, the Law of the Pack, and the Cub Scout Motto. The Cub Scout Promise reads as follows: I, (name), promise to do my best, To do my duty to God and my country To help other people, and To obey the Law of the Pack.

21. The Law of the Pack reads as follows:

The Cub Scout follows Akela.The Cub Scout helps the Pack go. The Pack helps the Cub Scout grow The Cub Scout gives goodwill.

"Akela" is the mythical leader of a wolf pack described in "The

Story of Akela and Mowgli," which in turn is based upon the story "Mowgli's Brothers" in Rudyard Kipling's Jungle Book. See Wolf Cub Scout Book (Defendants' Exhibit No. 7) at 4-10. The term "Akela" is used in Cub Scouting to refer to adult authority figures, including both den leaders and parents.See id. at 10-11.

22. The Cub Scout motto is "Do Your Best."

23. The Cub Scouting program takes place in three principal venues. The individual Cub Scout conducts many activities at his home with his family; the den, consisting of six to eight boys, generally meets at the home of the adult den leader, usually a parent of one of the boys in the den; and the Cub Scout pack, comprising four to six dens, typically meets in a room provided by the sponsoring organization, such as a church or civic organization

24. Den meetings are generally held weekly. Pack meetings are held once a month.

25. Some ceremonies often held during den meetings are progress toward ranks ceremonies, Denner Installation ceremonies (recognizing the appointment of new boy leaders), and special recognition ceremonies, which acknowledge special achievements and activities participated in by the boys.

26. A typical pack meeting is attended by the boys in each den and their families, den and pack leaders, and an occasional guest specially invited by the leaders. In order to encourage family attendance, pack meetings are held in the early evening. The Cub Scouts assemble as dens, with their families sitting behind them.

27. The pack meeting typically commences with a ceremony led by the Cubmaster, the principal adult leader of the pack, which ordinarily includes a recitation of the Cub Scout Promise.

28. Most pack meetings feature a recognition period in which Bobcat, Wolf, Bear, and Webelos badges and other symbols of achievement are presented. A formal ceremony, involving the Cub Scout's family, surrounds the presentation of each badge.

29. This recognition period is often followed by a demonstration conducted by the Webelos dens of projects performed or skills acquired during the prior month. Games involving the parents, Cub Scouts, and siblings may also follow.

30. Cub Scouts are encouraged to wear Cub Scout uniforms to meetings of their den and pack. The colors of the Cub Scout uniform have symbolic meaning. The blue stands for truth and spirituality, steadfast loyalty, and the sky above; the gold for warm sunlight, good cheer, and happiness.

31. Most packs hold a Blue and Gold banquet during Scouting anniversary week in February. The activities at a Blue and Gold banquet are largely the same as those of a regular pack meeting, although special guests may take part in the program.

32. The Tiger Cubs program is a relatively new BSA program designed for first- grade boys and their adult partners. Tiger Cub Groups, consisting of four to eight boy and adult pairs (or teams), are affiliated with Cub Scout packs, but operate independently under separate programs.

33. The Tiger Cub Promise is: I promise to love God, my family, and my country, and to learn about the world. The Tiger Cub motto is: "Search, Discover, Share."

34. The Tiger Cub emblem is symbolic of the program's stress on equal participation.

35. A Tiger Cub Group comprises four to eight Tiger Cubs and their adult partners who meet monthly. A Tiger Cub Group is affiliated with a Cub Scout pack.

36. Tiger Cub groups normally recite the Tiger Cub promise at each meeting.

37. Achievement is not as strongly emphasized at the Tiger Cub level, but the completion of activities can be rewarded by the adult partner's presenting a Tiger Cub sticker to the boy for each activity completed.

38. On or about September 11, 1989, on the premises of Anne Jeans Grade School, plaintiff Mark Welsh was supplied with a flyer. A copy of the flyer is offered as Plaintiffs' Exhibit No. 1 without objection as to authenticity an) is incorporated herein by reference. The front page of that flier stated: JOIN TIGER CUBS, BSA AND HAVE LOTS OF FUN! YOU CAN JOIN TIGER CUBS, BSA, IF YOU ARE IN THE FIRST GRADE

The reverse side of the flyer, directed to parents, stated, inter alia, that "[a]ny boy who is in the first grade (or is 7 years old) may join Tiger Cubs, BSA, with his adult partner," and further that "[a]ny adult 18 years of age or older can work with the boy in Tiger Cubs, BSA. This can be mom, dad, an aunt, uncle, or grandparent, an older brother or sister, or even a neighbor." Finally, the flyer contained an invitation to a special informational meeting sponsored by Pack 56 at the Palisades School in Burr Ridge, Illinois on September 15, 1989.[4]

39. On Friday, September 15, 1989 at 7:00 p.m., plaintiffs Mark Welsh and Elliott Welsh attended a recruiting meeting of prospective members of Pack 56 at the Palisades School in Burr Ridge, Illinois.

40. At that time, plaintiffs learned that the applications to join BSA required the applicants to agree to recognize an obligation to God.

41. Plaintiffs left the meeting without applying, but subsequently Elliott Welsh sent the application and fee directly to the West Suburban Council.

A copy of Plaintiffs' application is offered as Plaintiffs' Exhibit No. 2 without objection as to authenticity and is incorporated herein by reference. Plaintiffs refused to subscribe to the Declaration of Religious Principle and any reference to God.

42. The West Suburban Council returned the application and fee to Elliott Welsh, explaining that agreement with the Declaration of Religious Principle is a requirement for admission into a Tiger Cub Group.

43. At the present time, Mark Welsh is eight years old and desires to join a Cub Scout den. He will not be admitted unless he subscribes to the Cub Scout Promise, in which a Cub Scout promises to do his best to do his duty to God.

44. Neither Mark Welsh nor Elliott Welsh believes in God. Mark Welsh is not willing to subscribe to the Cub Scout Promise and Elliott Welsh is not willing to subscribe to the Declaration of Religious Principle.

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[4]The foregoing citations to the specific statements and information included in the flyer are the Court's.

45. Elliott Welsh wants his son to be a Cub Scout because of certain non-religious values he recognizes that BSA instills in boys, as well as the "fun" aspects of Scouting.

46. Elliott Welsh believes that if BSA were a sectarian youth group, it would be free to exclude atheists.

47. Parents are always welcome at any Scouting activity, even though they are not actual members of BSA. They do not, however, normally attend den meetings.

48. The families of every Cub Scout are invited to attend pack meetings with the Cub Scout, regardless of whether they are actual members of BSA. Additionally, families, whether members of BSA or not, are invited to a yearly Blue and Gold banquet, which usually takes the place of the February pack meeting.

49. In order to further the purposes of the Scouting movement, BSA sells books, uniforms, badges, camping equipment, and other Scouting materials. These sales are "supply operations."

50. BSA publishes certain guides and other materials. Among the materials published by BSA are the Cub Scout Leader Book, The Cub Scout Fun Book, Boys Life, A Representative Membership, The BSA Charter and By Laws, and BSA Rules and Regulations.

51. West Suburban Council receives some operating funds from the United Way. B. Court's Independent Findings of Fact 1. The Boy Scouts is an educational organization whose central purpose is to foster the development of certain skills and values in male youths. These include citizenship, patriotism, self-reliance, courage, sportsmanship, respect for one's family, the ability to get along with others, involvement in the community, physical fitness, athletic and survival skills, an appreciation for nature, and the acknowledgement of a supreme being.[5]

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[5]See, e.g., Charter and By-Laws of the Boy Scouts of America (Plaintiffs' Exhibit No. 9, Defendants' Exhibit No. 1) at 6, By-Laws Article I, Section 2; id at 17, Article IX, Section 1; id. at 18, Article X, Section 1; Rules and Regulations of the Boy Scouts of America (Plaintiffs' Exhibit No. 8, Defendants' Exhibit No. 2) at 5, Article X, Section 1, Clause 1; By-Laws, West Suburban Council, Boy Scouts of America (Defendants' Exhibit No. 4) at 1, Article II, Section 1; Constitution and By-Laws of the World Organization of the Scout Movement (Defendants' Exhibit No. 5) at 3, Article I, Sections 1 and 2. See also Tr. at 58-59 (testimony of Sandra Dixon); Tr. at 79 (testimony of Ben Dixon); Tr. at 100-01 (deposition

2. The educational aims of the Boy Scouts are in great measure accomplished through a range of activities which are designed, and are represented to be, recreational and entertaining. As explained in the Cub Scout Leader Book:

Cub Scouting is Fun

A boy joins Cub Scouting for the fun he expects. Part of that fun is belonging to a den and taking part in exciting, fun-filled activities. Cub Scouting's fun is not exclusively for boys; it's fun for leaders and families, as well. And an interesting thing happens—while the boys are having fun, doing the things they like to do, without realizing it they are also learning new things, developing new skills, gaining self-confidence, and becoming more worthwhile individuals. Cub Scout Leader Book (Plaintiffs' Exhibit No. 4, Defendants' Exhibit No. 6) at 4.[6]

3. Boys are encouraged to join Tiger Cubs, Cub Scouts, and Boy Scouts, and to a significant extent do join these groups, in order to have fun.[7]

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testimony of William A. McCleery, III); Tr. at 136 (testimony of Boyd Ridley Critz, III); Tr. at 228, 230-31, 231-32 (testimony of Carol C. Rapacz); Tr. at 238 (testimony of Eugene F. "Bud" Reid); Tr. at 249-50, 261 (testimony of Rabbi Peter E. Hyman); Tr. at 345 (testimony of Professor Larry Jensen).

[6]See also, e.g., Cub Scout Leader Book (Plaintiffs' Exhibit No. 4, Defendants' Exhibit No. 6) at 3 ("The purpose of the Boy Scouts of America . is to provide for boys and young adults an effective educational program designed to train in the responsibilities of participating citizenship, provide growth in moral strength and character, and to enhance the development of physical, mental, and emotional fitness Mighty serious business, all done in the spirit of fun."); id. at 43-58 (listing suggested activities); Wolf Cub Scout Book (Defendants' Exhibit No. 7) (listing activities); Big Bear Cub Scout Book (Defendants' Exhibit No. 8) (listing activities); Boy Scout Handbook (10th ed. 1990) (Defendants' Exhibit No. 10) at 544 ("When you go to a weekly troop meeting, you can expect 90 minutes packed with activities.... There will be plenty of fun and good fellowship, too, in the form of songs, stunts, and ceremonies."); Tiger Cub Flip Chart (Defendants' Exhibit No. 15) at 4 ("Most importantly, the Tiger Cub program enables your boy and you to have fun together, to learn new things together and to grow together."); id. at 15 ("The Tiger Cub Family Activity Book is your guide to a year of fun with a purpose."); Cub Scout Fun Book (Plaintiffs' Exhibit No. 5) (describing various entertaining activities). See also Tr. at 94, 97, 99, 100-01 (deposition testimony of William A. McCleery, III); Tr. at 134, 135-36, 136-37, 146, 514 (testimony of Boyd Ridley Critz, III); Tr. at 249-50 (testimony of Rabbi Peter E. Hyman); Tr. at 386 (testimony of Professor Ricky L. Slavings).

4. The structure of the Boy Scouts emphasizes group activities. Thus, members are organized into groups which range from the smaller dens or patrols to the larger packs or troops. Much, if not most, of what a young man does as a member of the Boy Scouts he does in the context of these groups.[8]

5. The smallest of these groups, the den or patrol, is the focal point of Boy Scout activities.[9] These groups meet most frequently (typically on a weekly basis).[10] For the individual Boy Scout member, the other members of the den or patrol are likely to be the Scouts he will come

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[8]See, e.g., Boy Scout Handbook (10th ed. 1990) (Defendant's Exhibit No. 10) at ix ("Don't wait a minute longer to get in on all the fun Scouts have."); id. at 2 ("Finally, Scouting is fun. You can look around during Scouting activities and notice a smile on every face. Everyone is sharing learning, and living the Scout life."); Cub Scout Handbook (Plaintiffs' Exhibit No. 4, Defendants' Exhibit No. 6) at 3 ("A boy joins Cub Scouting for the fun he expects." and "Cub Scouting helps fulfill a boy's desire for adventure...."); Tiger Cub Flip Chart (Defendants' Exhibit No. 15) at 10 ("Tiger Cubs, BSA, gives you and your boy a year of fun and exciting activities."). See also Tr. at 51, 52 (testimony of Sandra Dixon); Tr. at 68, 70 (testimony of Mark Welsh); Tr. at 72, 79 (testimony of Ben Dixon); Tr. at 94 (deposition testimony of William A. McCleery, III).

[9]See, e.g., Rules and Regulations of the Boy Scouts of America (Plaintiffs' Exhibit No. 8, Defendants' Exhibit No. 2) at 5-6 (describing pack, troop, and post structures); Constitution and By-Laws of the WorldOrganization of the Scout Movement (Defendants' Exhibit No. 5) at 5, Article III (listing membership in small groups as one of primary means by which Scout Method's system of progressive self-education is achieved)
Boy Scout Handbook (10th ed. 1990) (Defendants' Exhibit No. 10) at 535 ("As a member of a patrol, you are no longer alone..You will be able to achieve much more than you would by yourself." and "A patrol is a team of good friends working together to make things happen."); id. at 54 0 (describing relationship of patrol to troop); Tiger Cub Flip Chart (Defendants' Exhibit No. 15) at 6 ("You and your boy share with each other and with other members of your Tiger Cub group all the great things you have done together."); id. at 15 (emphasizing activities with Tiger Cub group); Webelos Scout Book (Defendants' Exhibit No. 9) at 18 ("Much of your boy's activity badge work will be done in the den.").
See also Tr. at 166 (testimony of Charles E. Rummel); Tr. at 350 (testimony of Rabbi Peter E. Hyman); Tr. at 374-78, 379, 380, 382-84 (testimony of Professor Ricky L. Slavings).

[10]See, e.g., Cub Scout Leader Book (Plaintiffs' Exhibit 4, Defendants' Exhibit No. 6) at 12-13 (describing Cub Scout and Webelos dens and Tiger Cub groups); Wolf Cub Scout Book (Defendants' Exhibit No. 7) at 30 ("Cub Scouting is fun, and much of that fun starts in your den."); Boy Scout Handbook (10th ed. 1990) (Defendants' Exhibit No. 10) at 535 (describing patrol); id. at 540 ("Patrols are such a key part of Scouting that a portion of troop meetings is set aside for each patrol to meet by itself.") See also Tr. at 391-92 (testimony of Professor Ricky L. Slavings).

[11]See, e.g., Cub Scout Leader Book (Plaintiffs' Exhibit 4, Defendants' Exhibit No. 6) at 12, 13, 73, 76; Wolf Cub Scout Book (Defendants' Exhibit No. 7) at 30; Big Bear Cub Scout Book (Defendants' Exhibit No. 8) at 14; Webelos Scout Book (Defendants' Exhibit No. 9) at 14; Boy

to know best and with whom he will have the most regular contact.[11] Boys typically attend the larger pack, troop, or post meetings as dens or patrols.[12]

6. Virtually all Boy Scout activities are group oriented. The activities at weekly Cub Scout den meetings, for example, typically call for group interaction. These might include a rowdy game designed to expend energy, a lesson in how to tie a necktie, a craft activity, a group sing-along of "God Bless My Underwear," or a nature hike.[13] Even the individual attainment of achievement badges, which represents one of the central ways in which the organization's education aims are accomplished, is tied to the group. Work on these achievements is frequently a focus of den meetings.[14] At the same time, individual achievements are reviewed and sometimes reflected on charts displayed at den meetings or beads worn by scouts as part of their uniforms.[15] Awards for such achievements are presented in the larger pack or troop setting.[16]

Scout Handbook (10th ed. 1990) (Defendants' Exhibit No. 10) at 540, 544; Official Scout-Master Handbook (Defendants' Exhibit No. 73) at 76-77. See also Tr. at 52-53 (testimony of Sandra Dixon); Tr. at 222 (testimony of Carol C. Rapacz); Tr. at 393 (testimony of Professor Ricky L. Slavings); Tr. at 548 (testimony of Gerrold Frumm).

."See, e.g., Cub Scout Leader Handbook (Plaintiffs' Exhibit No. 4, Defendants' Exhibit No. 6) at 12 ("The den organization allows boys to get to know each other better...."); Boy Scout Handbook (10th ed. 1990 (Defendants' Exhibit No. 10) at 535 ("A patrol is a team of good riends..."); id. at 540. See also Tr. at 374, 379, 380 (testimony of Professor Ricky L. Slavings); nd see Tr. at 58 (testimony of Sandra Dixon) ("It was more fun for my son to see the Planetarium with his five best friends or five good friends than it was just to go with the family.")

"See Cub Scout Leader Book (Plaintiffs' Exhibit No. 4, Defendants' Exhibit No. 6) at 68; Boy Scout Handbook (10th ed. 1990) (Defendants' Exhibit No. 10) at 544; Official Scout-Master Handbook (Defendants' Exhibit No. 73) at 87. See Tr. at 383, 392-93 (testimony of Professor Ricky L. Slavings).

"See, e.g., Cub Scout Leader Book (Plaintiffs' Exhibit No. 4, Defendants' Exhibit No. 6) at 26, 74-75; Boy Scout Handbook (10th ed. 1990) at 540, 544; Tiger Cubs, BSA Family Activity Book (Defendants' Exhibit No. 13) at 3 P 5, 4-5. See also activities described in Wolf Cub Scout Book (Defendants' Exhibit No. 7); Big Bear Cub Scout Book (Defendants' Exhibit No. 8); Webelos Scout Book (Defendants' Exhibit No 9

See also Tr. at 45-46, 48-51 (testimony of Sandra Dixon); Tr. at 72-73, 76-77 (testimony of Ben Dixon); Tr. at 106-07 (deposition testimony of William A. McCleery, III); Tr. at 135 (testimony of Boyd Ridley Critz, III); Tr. at 220-21, 225-26 (testimony of Carol C. Rapacz); Tr. at 384 (testimony of Professor Ricky L. Slavings); Tr. at 549 (testimony of Gerrold Frumm)

..."See Tr. at 45 (testimony of Sandra Dixon); Tr. at 221 (testimony of Carol C. Rapacz).

7. Boy Scout activities frequently make use of items which are sold by the Boy Scouts. These include Boy Scout uniforms, the Cub Scout Fun Book and other books describing various activities appropriate for Boy Scout meetings, camping equipment, and other items. These items are sold throughout the United States at local council service centers and Boy Scout-authorized outlets.[17]

8. Elliott Welsh was able to purchase two Boy Scout items, a Tiger Cub T-shirt and a scout leader's cap, through a J.C. *1521 Penney's catalog. These were shipped to Mr. Welsh from a catalog center in Milwaukee, Wisconsin. (Tr. at 29-30.) He was also able to purchase copies of the Cub Scout Fun Book and the Cub Scout Leader Book from a department store in LaGrange, Illinois. (Id. at 29.)

9. In the year ending 1989, the Boy Scouts took in over $13 million from supply operations, which included the sale of such items.[18]

10. Given the large volume of such products which the Boy Scouts sells throughout the country, it is virtually certain that many if not

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[17]See Tr. at 225, 226 (testimony of Carol C. Rapacz).

[18]See Cub Scout Leader Book (Plaintiffs' Exhibit No. 4, Defendants' Exhibit No. 6) at 72; Official Scout-Master Handbook (Defendants' Exhibit No. 73) at 88

[19]See also Tr. at 73 (testimony of Ben Dixon); Tr. at 227 (testimony of Carol C. Rapacz). See photograph of Cub Scout den meeting in home of Carol Rapacz (Defendants' Exhibit No. 74) showing scouts in uniform; Boy Scout Handbook (10th ed. 1990) (Defendants' Exhibit No. 10) at 27 (noting that camping gear available at national Supply Division of Boy Scouts of America); id. at 27-28, 36, and 51-53 (picturing various Scout camping equipment); id. at 567 ("How to Get a Uniform"); Webelos Scout Book (Defendants' Exhibit No. 9) at 24 ("Securing the Uniform"); Cub Scout & Webelos Scout Program Helps 1991-92 (Defendants' Exhibit No. 64) at Cu Intro 91 and back cover (listing resources available for purchase from Boy Scouts equipment distributors or council service centers, including Cub Scout Leader How-To Book, Cub Scout Song Book, Cub Scout Sports Leader Guide, Wolf Cub Scout Book, Big Bear Cub Scout Book, Webelos Scout Book, Webelos Den Activities, Cub Scout Fun Book, Cub Scout Magic, Bobcat Action Book, Wolf Action Book, Bear Action Book, and Tiger Cub Family Activity Packet); Official Scout-Master Handbook (Defendants' Exhibit No. 74) at 211, 212, 330 (listing literature, camping equipment, and uniforms available for purchase) See also Tr. at 45, 49-51 (testimony of Sandra Dixon) (describing use of activities set forth in How-To, Wolf, and Bear books); Tr. at 139-40, 149 50 (testimony of Boyd Ridley Critz, III) (describing items sold by Boy Scouts of America); Tr. at 222, 223-26 (testimony of Carol C. Rapacz) (noting that uniforms were worn at Cub Scout meetings, and describing Defendants' Exhibit No. 74); id. at 241 (noting use of den chief book as a resource for songs).

[20]See Boy Scouts of America, 1989 Report of the Treasurer and Financial Statements (Plaintiffs' Exhibit No. 6) at 3.
See also Tr. at 139-41 (testimony of Boyd Ridley Critz, III).

most of these items have moved in interstate commerce. However, with the exception of Elliott Welsh's testimony regarding the purchase of items from the J.C. Penney catalog center in Wisconsin, plaintiffs have not presented any direct evidence on this point.

11. Although these items are used in or foster various activities which are entertaining, they are not indispensable to Boy Scout activities.[19]

12. Boy Scout activities do not depend upon or necessarily emanate from particular facilities or locations. Den, patrol, pack, and troop meetings, for example, typically take place at private homes, public schools, and church facilities.[20]

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[19]See, e.g., Boy Scout Handbook (1st ed. 1911) (Defendants' Exhibit No. 12) at 46 ("It should be clearly understood by all interested in the Scout Movement that it is not necessary for a boy to have a uniform or any other special equipment to carry out the scout program. There are a great many troops in the country which have made successful progress without any equipment whatever."). See also Tr. at 238 (testimony of Carol C. Rapacz) (uniforms not required); id. at 241 (noting limited use of Cub Scout Fun Book); Tr. at 355 (testimony of Professor Larry Jensen) (uniforms not required).

[20]See, e.g., Cub Scout Leader Book (Plaintiffs' Exhibit No. 4, Defendants' Exhibit No. 6) at 68, 73, 76; Webelos Scout Book (Defendants' Exhibit No. 9) at 14; Boy Scout Handbook (10th ed. 1990) (Defendants' Exhibit No. 10) at 540; Pack 52 1990-91 Orientation Guide (Defendants' Exhibit No. 61) at 12. See also Tr. at 14 (testimony of Sandra Dixon); Tr. at 219 (testimony of Carol C. Rapacz); Tr. at 519 (testimony of Boyd Ridley Critz, III); Tr. at 549 (testimony of Gerrold Frumm).

[21]See, e.g., Cub Scout Leader Book (Plaintiffs' Exhibit No. 4, Defendants' Exhibit No. 6) at 73 ("Most dens meet in the den leader's home. Meetings are usually held in the same room; however, they can b held in a basement, garage, backyard, or other practical place. Many dens in large cities meet in apartment houses, small parks, or squares nearby. Some dens in rural areas meet in a school classroom because of distances involved in traveling to someone's home."); Webelos Scout Book (Defendants' Exhibit No. 9) at 14 ("The Webelos den meets once each week in the evening or on Saturday. The meeting place probably is either the home of the den leader or some central place, perhaps in the chartered organization's building if it has one."); Boy Scout Handbook (10th ed. 1990) (Defendants' Exhibit No. 10) at 544 ("Not every troop meeting is held at the same place or at the usual time. Now and then a troop may hold its weekly meeting at a fire station or police headquarters so that you ca learn firsthand how your town is protected. Another time you may gather at a local pool and try to pass some of the swimming requirements for a rank or merit badge. Or the troop might go to city hall to see your government in action."); Boy Scout Handbook (1st ed. 1911) (Defendants' Exhibit No. 12) at 3 ("All that is needed is the out-of-doors, a group of boys, and a competent leader."); Scouting Handbook (Relationships between The Church of Jesus Christ of Latter-day Saints and the Boy Scouts of America) (Defendants' Exhibit No. 52) at 9 ("Patrol meetings could be held at the meetinghouse, in a home, or in an outdoor setting."); Pack 52 1990-9 Orientation Guide (Defendants' Exhibit No. 61) at 12 (noting that Pack 52 meets monthly at the Hinsdale United Methodist Church).

Nothing in the nature of the activities which normally occur at such meetings requires a particular kind of location or facility.[21]

IV. ANALYSIS

The threshold question presented in this case is whether or not an organization like the Boy Scouts, membership in which does not provide access to a particular facility, qualifies as a "place of public accommodation" within the reach of Title II. Accordingly, it is appropriate to begin with the statute itself. See Ardestani v. I.N.S., — U.S. ——, 112 S.Ct. 515, 519, 116 L.Ed.2d 496 (1991); United States v. Real Estate *1522 Known as 916 Douglas Ave., Elgin, Ill., 903 F.2d 490, 492 (7th Cir.1990), cert. dismissed, — U.S. ——, 111 S.Ct. 1090, 112 L.Ed.2d 1194 (1991). Title II provides, in relevant part, as follows:

(a) All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin(b) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this subchapter if its operations affect commerce, or if discrimination or segregation by it is supported by State action:

(3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment;

c) The operations of an establishment affect commerce within the meaning of this subchapter if ... (3) in the case of an establishment described in paragraph (3) of subsection (b) of this section, it customarily presents films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce; .... For purposes of this section, "commerce" means travel, trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia and any State, or between any foreign country or any territory or possession and any State or the District of Columbia, or between pointsin the same State but through any other State or the District of Columbia or a foreign country.[22]

42 U.S.C. s 2000a. Plaintiffs contend that given the Boy Scouts' emphasis upon recreational activities and the enjoyment of its members, it qualifies as a "place of entertainment" within the meaning of subsection (b)(3) above. In contrast, defendants have argued that the Boy Scouts does not fit within either the ordinary understanding of the term "place" or the category of establishments cited within the statute as "places of entertainment."

[1] The Court is therefore called upon to resolve whether the term "place," as it is used to modify the terms "public accommodation" and "entertainment," should be accorded its literal connotation of a physical site or whether it should be taken simply as a term of convenience which does not limit the reach of Title II to accommodations which have a specific location or facility. Although the Court has discussed this issue below largely in the context of construing the phrase "place of public accommodation," the analysis applies with equal force to the statutory subcategory of "places of entertainment" into which plaintiffs contend the Boy Scouts falls.

The parties have not cited, and the Court has been unable to locate, any federal case which expressly considers whether or not a membership organization, the activities of which do not center upon a particular facility or "place," can qualify as a "place of entertainment" or other "place of public accommodation" for purposes of Title II. However, a number of state courts have considered this question in applying anti-discrimination statutes which contain language similar to that of Title II. As set forth below, a renewed study of these cases, considered in light of the evidence presented in this case, leads the Court to conclude that the Boy Scouts does not constitute a "place of public accommodation" within the framework of Title II. Moreover, a review of federal cases which have considered the applicability of Title II to membership organizations confirms that Title II has never been applied so broadly as to encompass organizations which lack a tie to a facility of the kinds enumerated in the statute. At the same time, a perusal of the legislative history of the statute suggests that the use of the term "place" in the statute reflects a congressional understanding that Title II[23] would not be applied more expansively.

At least four state courts have rejected the notion that a membership organization in and of itself may be considered a "place" for purposes of state laws prohibiting discrimination in places of public accommodation: United States Jaycees v. Iowa Civil Rights Commission, 427 N.W.2d 450 (Iowa 1988); United States Jaycees v. Massachusetts Commission Against Discrimination, 391 Mass. 594, 463 N.E.2d 1151 (1984); United States Jaycees v. Richardet, 666 P.2d 1008 (Alaska 1983); and United States Jaycees v. Bloomfield, 434 A.2d 1379 (D.C.App.1981). As the case names reveal, the courts in each of these cases considered the Jaycees, a membership organization which does not operate from a particular facility or location. At issue in each of the cases was the validity of the Jaycees' policy of excluding women from full membership in the organization in light of legislation barring discrimination on the basis of sex in public accommodations. The courts in all of these cases found the use of the term "place" in the governing statutes to be significant, and because the Jaycees was not tied to a particular location or facility, they concluded that the organization was beyond the reach of those statutes. United States Jaycees v. Massachusetts Commission Against Discrimination ("MCAD ") is illustrative. In this case the Massachusetts Commission Against Discrimination ("MCAD") had found that the U.S. Jaycees') policy of excluding women from membership violated the Massachusetts statute barring gender discrimination in "any place of public accommodation, resort or amusement." The Jaycees sought judicial review of MCAD's decision, and the case was certified to the state supreme court. That court concluded that the Jaycees did not constitute a place of public accommodation for purposes of the statute. The Massachusetts court began by observing what a "tortuous analysis" was required in order to deem the U.S. Jaycees a "place of public accommodation." 463

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[17]The Court initially considered these authorities when it ruled upon defendants' motion to dismiss the complaint, which required the Court to construe the pleadings in a light most favorable to the plaintiffs. At that time, however, the Court did not have the benefit of an evidentiary record before it, and held only that the Boy Scouts might qualify as a place of public accommodation for purposes of Title II. See 742 F.Supp. at 1421.

N.E.2d at 1155. [T]he MCAD observed that the State and local Jaycees chapters certainly do meet in physical "place[s]" within Massachusetts, albeit a large number of different ones. Since a "sufficiently strong nexus" exists between the U.S. Jaycees and the State and local organizations, when the latter two meet at a "place" within Massachusetts, it can be hypothesized that the national organization is meeting at that "place" also. The membership of the U.S. Jaycees is demonstrably "public": all males who are between the ages of eighteen and thirty-five and who pay the dues are admitted to the organization. If the assumption that membership in the national Jaycees organization can be tied to a "place" in Massachusetts is then combined with the observation that such membership is "public," it is possible to reach the same conclusion as the MCAD, that the U.S. Jaycees is a "place of public accommodation" within the meaning of [the Massachusetts statute]. While this line of reasoning is relatively easy to follow, it is hard to accept. Id. The court found MCAD's rationale inconsistent with the statute's emphasis upon the word "place." The statute defined a place of public accommodation "to include any place .. which is open to and accepts or solicits the patronage of the general public." In the court's view, "place" should not be treated as a term of art defined in technical terms, but rather should be interpreted in light of its ordinary connotation of a physical environment. *1524 Id. at 1155-56. To bring within the definition of "places of public accommodation" any organization which met at "places," the court reasoned, would accord the Massachusetts statute a sweeping application; ignore the commonly understood definition of a term the legislature had used; and bring the statute to bear upon a category of institutions unlike any of the examples cited in the statute, each of which conformed to the ordinary notion of a "place." Id. at 1156.

[T]he MCAD's interpretation of [the statute] as including the U.S. Jaycees does not call for the mere addition of another physical "site" to the statutory language, but instead it requires the addition of a type of "conduct" (a nonprofit organization's membership policy). Such an interpretation cannot be derived from the plain language or a reasonable construction of [the statute]. Id. at 1159.

Finally, the Massachusetts court noted the significant difference between the Jaycees and organizations in which membership serves as the means of access to a physical facility. Distinguishing National Organization for Women v. Little League Baseball, Inc., 127 N.J.Super. 522, 318 A.2d 33, aff'd mem., 67 N.J. 320, 338 A.2d 198 (1974) (holding Little League to be a public accommodation), and United States v. Slidell Youth Football Association, 387 F.Supp. 474 (E.D.La.1974) (holding football league to be a public accommodation under Title II), the court explained: In both cases, although an organization's membership policy was implicated, membership in the relevant entity served effectively as the "ticket" for admission to a particular "place." In Slidell Youth Football Ass'n, supra at 477, the "place" was a sports facility containing "two fully equipped football fields, grandstands and a food concession stand enclosed in a chain link fence," the facility being "utilized solely to play SYFA sponsored youth football league games." In Little League Baseball, Inc., supra at 531, 318 A.2d 33, the "place of public accommodation ... [was] obviously the ball field at which tryouts are arranged, instructions given, practices held and games played." It is important to distinguish the case of a discriminatory membership policy (which the U.S. Jaycees concededly practices) from circumstances where the denial of membership is used as a method for denying access to a particular place. 463 N.E. 2d at 1159.[24]

Other courts have echoed the Massachusetts court's emphasis upon statutory use of the term "place" and the common understanding of that term. See Iowa Civil Rights Commission, 427 N.W.2d at 454; Richardet, 666 P.2d at 1011; Bloomfield, 434 A.2d at 1381. Like the

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[24]The Massachusetts court noted further that all Jaycees events were open to the public; consequently, the denial of membership in the organization did not serve as a bar to a given place. See 463 N.E.2d at 1159. In contrast, although the evidence indicates that family members are invited to some Boy Scout events, such as pack meetings, most of the organization's activities are not open to the public. Nonetheless, as set forth below, MCAD 's logic is still relevant here, in the sense that membership in the Boy Scout organization does not serve as an entree to a particular place. As the Court noted above in its findings of fact, Boy Scout meetings and activities take place in a variety of settings (many times, private homes or churches) and for the most part, the particular location is irrelevant to what transpires at those meetings.

Massachusetts court, these courts have also noted that membership organizations stand apart from the types of "places" typically listed in public accommodations statutes. Richardet, 666 P.2d at 1011-1012. See also Iowa Civil Rights Commission, 427 N.W.2d at 454-55. The courts of other states have struck out upon a different path and have interpreted their anti-discrimination statutes more broadly to reach membership organizations, including the Boy Scouts. See Quinnipiac Council, Boy Scouts of America, Inc. v. Commission on Human Rights and Opportunities, 204 Conn. 287, 528 A.2d 352 (1987); United States Power Squadrons v. State Human Rights Appeal Board, 59 N.Y.2d 401, 465 N.Y.S.2d 871, 452 N.E.2d 1199 (1983); Curran v. Mount Diablo Council of the Boy Scouts *1525 of America, 147 Cal.App.3d 712, 195 Cal.Rptr. 325 (1983); United States Jaycees v. McClure, 305 N.W.2d 764 (Minn.1981); National Organization for Women v. Little League Baseball, Inc., supra, 127 N.J.Super. 522, 318 A.2d 33 (1974) ("NOW"). The holdings in several of these cases rest to a significant degree upon statutory language and a body of state jurisprudence which is particularly expansive and which does not restrict application of public accommodations statutes to physical "places." In contrast, the rationale of the New Jersey court in NOW and the New York Court of Appeals in Power Squadrons cannot be explained by these circumstances; the result in those cases instead flows from an expansive reading of the term "place of public accommodation." Further discussion of each of these cases is in order. Curran demonstrates the significance of liberal statutory phrasing and the resulting jurisprudence. In that case, the plaintiff sued the Boy Scouts under California's Unruh Civil Rights Act after the organization excluded him from membership because he was gay. In relevant part, the statute provided that:

All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

See 195 Cal.Rptr. at 333. The California Supreme Court previously had interpreted the act to prohibit discrimination based upon sexual

orientation. See Stoumen v. Reilly, 37 Cal.2d 713, 234 P.2d 969, 971 (1951). Therefore, the question presented in this case was whether or not the Boy Scouts constituted a "business establishment" within the meaning the statute. The trial court concluded that it did not; but the appellate court disagreed and reversed.

The legislative history of the Unruh Act figured prominently in the appellate court's decision. In particular, the court noted that although the original version of the statute had employed the same "places of public accommodation" phrasing found in the comparable statutes of other states, the California legislature had subsequently abandoned that term in favor of "business establishments of every kind whatsoever." 195 Cal.Rptr. at 334. This revision was made after the state judiciary had placed a narrow construction upon the kinds of public accommodations reached by the statute. Id. The court also relied heavily upon a line of California cases which had given the revised version of the Unruh Act an extremely broad application. This included cases which defined the term "business" to mean "everything about which one can be employed," id. at 335 (quoting Mansfield v. Hyde, 112 Cal.App.2d 133, 245 P.2d 577, 581 (1952)), and the term "establishment" to include "not only a fixed location, such as the 'place where one is permanently fixed for residence or business,' but also a permanent 'commercial force or organization' or 'a permanent settled position (as in life or business),' " 195 Cal.Rptr. at 335 (quoting Burks v. Poppy Construction Co., 57 Cal.2d 463, 20 Cal.Rptr. 609, 612, 370 P.2d 313, 316 (1962)). In addition, the court noted that the act had been held to reach even not-for-profit associations. 195 Cal.Rptr. at 335-36, citing O'Connor v. Village Green Owners Association, 33 Cal.3d 790, 191 Cal.Rptr. 320, 662 P.2d 427 (1983).[25]

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[25]In contrast, the Supreme Court of Oregon concluded in Schwenk v. Boy Scouts of America, 275 Or. 327, 551 P.2d 465, 468 (1976), that the Oregon Public Accommodation Act was intended "to prohibit discrimination by business or commercial enterprises which offer goods or services to the public," and not to organizations like the Boy Scouts and the YMCA and YWCA. (Emphasis supplied.)

Thus, the court rendered its decision against the backdrop of a statute which spoke broadly in terms of "business establishments of every kind whatsoever" and a well established line of authority which had interpreted the statute in a manner true to the expansive language the California legislature had chosen. Because the plaintiff's complaint attributed to the Boy Scouts certain "businesslike attributes," the court concluded that the organization could fall within the definition of a "business establishment" for purposes of the Unruh Act despite its status as a not-for-profit association. 195 Cal.Rptr. at 336. In McClure, the Minnesota Supreme Court was confronted with an equally broad statutory provision. Although, like Title II, the Minnesota statute banned discrimination by any "place of public accommodation," the Minnesota legislature had, in the court's words, given that term "its own special and unusually broad definition," 305 N.W.2d at 766. Thus, the statute defined "place of public accommodation" to include: a business, accommodation, refreshment, entertainment, recreation, or transportation facility of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages, or accommodations are extended, offered, sold, or otherwise made available to the public. See id. As the court noted, "The legislature defines a term only because it intends in some measure to depart from the ordinary sense of the term. Thus, there is a presumption that we are not to substitute the literal, ordinary meaning of 'place of public accommodation' for the definition the legislature has provided." Id. The court also took heed of the legislature's explicit directive to construe the provisions of the statute liberally. Id. Given the broad wording of the statute, the court found that its provisions applied even to establishments which were dissimilar to the specific kinds of places cited in an older version of the statute, which remained on the books: [W]hile the older statute contemplated only certain fixed and mobile sites, the new statute encompasses a "business facility of any kind," whether fixed or mobile. While the older statute concentrated on the kinds of sites where discrimination would be prohibited, the new statute focuses on conduct in which discrimination would be prohibited and thus speaks not of a business facility where goods and privileges are offered, but rather, of "a

business * * * facility of any kind * * * whose goods * * * [and] privileges are * * * offered, sold, or otherwise made available to the public." Id. at 768 (emphasis in original) . The court went on to find that the U.S. Jaycees constituted a public business within the meaning of the Minnesota statute. Based upon the record before it, the court was convinced that the Jaycees was "a national organization that regards its members more as customers than as owners" and that membership in the organization amounted to a "product"; thus, the Jaycees qualified as a "business." Id. at 769. It also constituted a "public" business, "[b]y virtue of its unselective, vigorous sale of memberships...." Id. at 771. Finally, the court determined that the U.S. Jaycees constituted a "facility" despite the fact that the national organization lacked an office or other physical "place" within Minnesota's borders. Id. at 772-74. The court reiterated that the terms of the newer statute reflected a shift away from an emphasis upon particular sites and toward an emphasis upon the conduct of businesses. Id. at 772. Consequently, the court reasoned, a court need not deem a given entity analogous to a hotel or restaurant in order to find the public accommodations statute applicable. Id. Food and lodging do not exhaust the category of a "business * * * facility of any kind * * * whose goods, * * * privileges, [and] advantages are * * * sold or otherwise made available to the public." Minn.Stat. s 363.01(18) (1980) (emphasis added). Leadership skills are "goods," business contacts and employment promotions are "privileges" and "advantages," and each site in the State of Minnesota where the sale of those "goods" is solicited, promoted, and consummated is unquestionably a "business facility." Id. (emphasis in original). The court further reasoned that to the extent a particular site need be identified as a "facility" for purposes of the statute, there were two which sufficed. The first was the office of *1527 the Minnesota Jaycees affiliate, where officers of the state organization supervised the recruitment activities of local chapters. Id. The second site lay "in the sometimes door-to-door, company-to-company solicitation of members for the organization" and "in the oft-shifted sites at which the affiliated local chapters hold meetings during

part of which a sales approach is usually made to prospective members invited to the meeting for that purpose." Id. What we decide here is that an organization engaged in the business of seeking to advance its members and to add to their ranks by assiduously selling memberships in this state is a "public business facility." In more familiar terms, such an organization has more than the "minimum contacts" to qualify as doing business in this state, and its facilities are anywhere it promotes, solicits, and engages in the sale of memberships on an unselective basis. Id. at 774. Quinnipiac Council addressed a statute which the Connecticut supreme court found to be as broadly drafted as the Minnesota statute. See 528 A.2d at 358. In that case, a woman contended that the Boy Scouts had violated the state's public accommodations statute when it refused to permit her to serve as the scoutmaster of a local troop. The statute guaranteed to Connecticut citizens the right to "full and equal accommodations in every place of public accommodation, resort, or amusement." The phrase "place of public accommodation, resort or amusement" was defined to include: [A]ny establishment, which caters or offers its services or facilities or goods to the general public including, but not limited to, public housing projects and all other forms of publicly assisted housing, and further including any housing accommodation, commercial property or building lot, on which it is intended that a housing accommodation or commercial building will be constructed, offered for sale or rent, and mobile home parks.... See 528 A.2d at 354. The Boy Scouts contended that the statute was limited to physical sites and could not be applied to membership organizations. However, the court rejected this argument in light of the way in which "places of public accommodation" had been defined and in light of the legislative history. Because the statute was ambiguous to the extent it defined "place of public accommodation" in terms of "any establishment" which offered its services to the public rather than in terms of physical sites, the court found it necessary to examine the legislative history. 528 A.2d at 357. The court noted first that public accommodation statutes were derived from the common law duties of innkeepers and common carriers. Id. at 357. Consistent with those origins, the

original version of Connecticut's public accommodations statute, which listed a variety of "places of public accommodation" that the legislature deemed to fall within the reach of the statute, included railroad cars, despite their lack of a fixed location. Id. at 357-58. Later, the "laundry list" of particular accommodations was dropped from the statute in favor of the provision defining a "place of public accommodation" as "any establishment which caters or offers its services or facilities or goods to the general public." Id. at 358. The legislative history was thus one of "steadily expanded coverage." Id. Paying heed to the remedial ends of the statute and the state's compelling interest in eradicating gender discrimination, the court concluded that the statutory history, coupled with the "unconditional language of the statute," rendered it unnecessary for an establishment to have an identifiable location in order for the public accommodations act to apply. 528 A.2d at 358. Like Minnesota's similarly broadly drafted public accommodation statute, whose comprehensive applicability was recognized in United States Jaycees v. McClure, 305 N.W.2d 764 (Minn.1981), and held to be constitutional in Roberts v. United States Jaycees, [468 U.S. 609, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984)], our statute now regulates the discriminatory conduct and not the discriminatory situs of an enterprise which offers its services to the general public. 528 A.2d at 358 (footnote omitted). [FN26]

FN26. Although the court concluded that the Boy Scouts was a "place of public accommodation" within the meaning of the Connecticut statute, it went on to hold that the act of denying the plaintiff the position of scoutmaster did not constitute a denial of access to a public accommodation. 528 A.2d at 360. The court reasoned that in seeking to become an adult leader, the plaintiff was attempting not to receive goods or services from the Boy Scouts, but to offer her own services to the organization. Id. In the court's view, the public accommodations statute did not reach this kind of situation. Id. In contrast to these cases, NOW, 318 A.2d 33, did not deal with a broadly worded statute. Instead, the New Jersey statute, much like Title II, simply barred the operator of any "place of public accommodation" from refusing to provide its "accommodations,

advantages, facilities, or privileges" on any of the grounds specified in the statute. In this case, the Little League appealed from an order of the New Jersey Division of Civil Rights requiring the league to admit girls into its baseball programs. One of the grounds upon which the Little League objected to the order was that the group did not constitute a "place of public accommodation" which was barred from discriminating on the basis of gender. Although the Little League was a membership organization which did not operate from a fixed parcel of real estate within New Jersey, the court nonetheless concluded that it qualified as a "place of public accommodation." The court began with the proposition that the public accommodations statute was a remedial law which should be applied in a manner "sympathetic to its (Cite as: 787 F.Supp. 1511,) objectives." Id. at 37. It then went on to hold that the term "place" should not be construed in such a manner as to limit the reach of the statute to the kinds of establishments normally thought of as public accommodations: The statutory noun "place" (of public accommodation) is a term of convenience, not of limitation. It is employed to reflect the fact that public accommodations are commonly provided at fixed "places," e.g., hotels, restaurants, swimming pools, etc. But a public conveyance, like a train, is a "place" of public accommodation although it has a moving situs. See N.J.S.A. 10:5-5(1), ("public conveyance"). The "place of public accommodation" in the case of Little League is obviously the ball field at which tryouts are arranged, instructions given, practices held and games played. The statutory "accommodations, advantages, facilities and privileges" at the place of public accommodation, N.J.S.A. 10:5-12(f), is the entire agglomeration of the arrangements which Little League and its local chartered leagues make and the facilities they provide for the playing of baseball by the children.... Little League is a public accommodation because the invitation is open to the children in the community at large, with no restriction (other than sex) whatever. See Clover Hill Swimming Club v. Goldsboro, 47 N.J. 25, 33, 219 A.2d 161 (1966). It is public in the added sense that local governmental bodies characteristically make the playing areas available to the local leagues, ordinarily without charge. 318 A.2d at

37. Thus, under NOW 's rationale, a membership organization need not be a "place" in order to come within the N.J.S.A. 10:5-5(1), ("public conveyance"). The "place of public accommodation" in the case of Little League is obviously the ball field at which tryouts are arranged, instructions given, practices held and games played. The statutory "accommodations, advantages, facilities and privileges" at the place of public accommodation, N.J.S.A. 10:5-12(f), is the entire agglomeration of the arrangements which Little League and its local chartered leagues make and the facilities they provide for the playing of baseball by the children.... Little League is a public accommodation because the invitation is open to the children in the community at large, with no restriction (other than sex) whatever. See Clover Hill Swimming Club v. Goldsboro, 47 N.J. 25, 33, 219 A.2d 161 (1966). It is public in the added sense that local governmental bodies characteristically make the playing areas available to the local leagues, ordinarily without charge. 318 A.2d at 37. Thus, under NOW 's rationale, a membership organization need not be a "place" in order to come within the N.J.S.A. 10:5-5(1), ("public conveyance"). The "place of public accommodation" in the case of Little League is obviously the ball field at which tryouts are arranged, instructions given, practices held and games played. The statutory "accommodations, advantages, facilities and privileges" at the place of public accommodation, N.J.S.A. 10:5-12(f), is the entire agglomeration of the arrangements which Little League and its local chartered leagues make and the facilities they provide for the playing of baseball by the children.... Little League is a public accommodation because the invitation is open to the children in the community at large, with no restriction (other than sex) whatever. See Clover Hill Swimming Club v. Goldsboro, 47 N.J. 25, 33, 219 A.2d 161 (1966). It is public in the added sense that local governmental bodies characteristically make the playing areas available to the local leagues, ordinarily without charge. 318 A.2d at 37. Thus, under NOW 's rationale, a membership organization need not be a "place" in order to come within the for- profit organization which promoted safety and skill in boating through public educational programs

sponsored by its local squadrons. Membership in the organization was restricted to men. The plaintiffs contended that the Power Squadron's membership policy constituted gender discrimination contrary to New York's public accommodations statute. The New York law prohibited discrimination in "any place of public accommodation, resort, or amusement." See 465 N.Y.S.2d at 874, 452 N.E.2d at 1202. An illustrative laundry list of such places was set forth in the statute: The term "place of public accommodation, resort or amusement" shall include, except as hereinafter specified, all places included in the meaning of such terms as: inns, taverns, road houses, hotels, motels, whether conducted for the entertainment of transient guests or for the accommodation of those seeking health, recreation or rest, or restaurants, or eating houses, or any place where food is sold for consumption on the premises; buffets, saloons, barrooms, or any store, park or enclosure where spirituous or malt liquors are sold; ice cream parlors, confectioneries, soda fountains, and all stores where ice cream, ice and fruit preparations or their derivatives, or where beverages of any kind are retailed for consumption on the premises; wholesale and retail stores and establishments dealing with goods or services of any kind, dispensaries, clinics, hospitals, bath-houses, swimming pools, laundries and all other cleaning establishments, barber shops, beauty parlors, theatres, motion picture houses, airdromes, roof gardens, music halls, race courses, skating rinks, amusement and recreation parks, trailer camps, resort camps, fairs, bowling alleys, golf courses, gymnasiums, shooting galleries, billiard and pool parlors; garages, all public conveyances operated on land or water or in the air, as well as the stations and terminals thereof; travel or tour advisory services, agencies or bureaus; public halls and public elevators of buildings and structures occupied by two or more tenants, or by the owner and one or more tenants. See 465 N.Y.S.2d at 875 n. 1, 452 N.E.2d at 1203 n. 1. New York's high court concluded that an organization which conducted public activities fell within the embrace of this definition. The court noted at the outset that the definition of places of public accommodation had repeatedly been enlarged over the years. In particular, it observed that original wording limiting

application of the statute to the places listed in the act had ultimately been deleted, which the court took to be "a clear indication that the Legislature intended that the definition of place of accommodation should be interpreted broadly." 465 N.Y.S.2d at 875, 452 N.E.2d at 1203. The court found two concepts embedded within the statute: "the idea of public accommodation in the broad sense of providing conveniences and services to the public, and the idea of place." Id. There was little question but that the Power Squadrons met the first of these two criteria. Its mission was one of public education, and consistent with that goal it sponsored boating safety courses attended by more than 70,000 people per year. See id. It conducted a variety of other public activities as well, each aimed at promoting public interest in boat safety and in the work of the organization itself. Id. These widespread public activities to promote the Power Squadrons' goals and to solicit public interest and participation in its courses are ... the equivalent of systematically offering a service or accommodation to the public and bringing petitioners within the statutory definition. Id. The court also found the second notion of "place" was satisfied, despite the fact that the Power Squadrons did not operate from a fixed location. We define "place" as did the New Jersey court when construing similar statutory language. It is a term of convenience, not of limitation (see National Organization for Women v. Little League Baseball, 127 N.J.Super. 522, 318 A.2d 33, aff'd, 67 N.J. 320, 338 A.2d 198; see also, New York Roadrunners Club v. State Div. of Human Rights, 81 A.D.2d 519, 437 N.Y.S.2d 681, aff'd on other grounds 55 N.Y.2d 122, 447 N.Y.S.2d 908, 432 N.E.2d 780; Matter of Walston & Co. v. New York City Comm. on HumanRights,

United States Jaycees v. McClure, 305 N.W.2d 764 [Minn.]). The statute itself suggests such an interpretation because it lists places of accommodations which have no fixed place of operation but supply their services at a variety of locations, e.g., travel and tour advisory services and public conveyances. The statute also applies to "establishments dealing with goods or services of any kind." Analytically, such establishments may discriminate by denying individuals access to any particular place, e.g., home delivery service

or services performed in the customer's home and mail order services. 465 N.Y.S.2d at 876, 452 N.E.2d at 12. The lower court had found that although the Power Squadrons did not conduct their activities at any one place, they did frequently make use of public schools and other public buildings, as well as public waterways, parks, and marinas. The court of appeals agreed that such locations supplied the "place" required in order to render the organization a "place of public accommodation": The place of public accommodation need not be a fixed location, it is the place where petitioners do what they do. Id. Returning for a look at Title II in light of these cases, it becomes apparent that the language of the federal statute is significantly more narrow than many of the state statutes which have been construed to embrace membership organizations. Title II does not, for example, purport to reach "business establishments of every kind whatsoever" as did the California statute at issue in Curran. Indeed, Title II retains the very "place of public accommodation" language which the California legislature had discarded in order to ensure that the statute would be given a broader application than the judiciary had previously given to it. Similarly, Title II does not include language referring to a business or entertainment "facility of any kind" as in McClure, or "any establishment, which caters or offers its services or facilities or goods to the general public" as in Quinnipiac. In each of these cases, the state courts emphasized that this type of phrasing was particularly broad and intended to expand the reach of the public accommodations statutes in question beyond the ordinary understanding of the term "place of public accommodation." See McClure, 305 N.W.2d at 766; Quinnipiac, 528 A.2d at 358. In contrast, the term "place" continues to figure prominently in the operative language of Title II. Consequently, cases such as Curran, McClure, and Quinnipiac are inapposite. The remaining cases call upon the Court to choose sides in the ongoing judicial debate over the significance of the term "place." NOW and Power Squadrons posit that the term is "one of convenience, not limitation" and suggest that an enterprise need not have a fixed physical site in order to attain status as a "place of public accommodation," at least insofar as the enterprise conducts its

activities at identifiable locations (e.g., playing fields, public schools, and so on) which would qualify as "places" of public accommodation. MCAD and cases of its ilk, however, maintain that the legislature used the term "place" for a reason, and that it should be attributed its ordinary meaning. In the view of these courts, an organization should not be deemed a "place of public accommodation" unless, in MCAD 's words, membership in the organization functions as a "ticket" to admission to a

(Cite as: 787 F.Supp. 1511, *1530) This Court believes the reasoning of MCAD to be most true to the language of Title II. The word "place" and the concept of a physical site both figure prominently in Title II. "Place" appears not only in the operative phrase "place of public accommodation" in subsection (a) of the statute, but *1531 again in subsection (b)(3) in the phrase "other place of exhibition or entertainment" which the Court is called upon to apply here. The word "establishment" is repeated throughout Title II as well. Indeed, subsection (b), the definitional portion of the statute, begins, "Each of the following establishments which serves the public is a place of public accommodation within the meaning of this subchapter...." See also s 2000a(b)(1), (b)(2), (b)(4). The term "establishment" can have connotations which are not tied to a particular site. See Welsh, 742 F.Supp. at 1420 n. 11; Burks v. Poppy Construction Co., supra, 20 Cal.Rptr. at 611-12, 370 P.2d at 315-16 ("establishment" defined to include a permanent commercial force or organization); but see United States Jaycees v. Iowa Civil Rights Commission, supra, 427 N.W.2d at 454 (Jaycees did not fit within terms "place" or "establishment," each of which ordinarily "connotes a spatial dimension which the Jaycees' membership, as such, does not possess"). Yet, the specific establishments cited in Title II all constitute the usual sorts of sites one normally thinks of as places of public accommodation: inns, motels, and hotels (s 2000a(b)(1)); restaurants, cafeterias, lunchrooms, lunch counters, soda fountains, and gasoline stations (s 2000a(b)(2)); and motion picture houses, theaters, concert halls, sports arenas, and stadiums (s 2000a(b)(3)). Moreover, subsection (b)(4) of the statute reiterates the concept of a

fixed site by including within the establishments covered by Title II: any establishment (A)(i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment. 42 U.S.C. s 2000a(b)(4) (emphasis supplied). Thus, the use of the term "place" in Title II, coupled with the use of fixed-cite facilities as examples of "places" and of the possibly broader term "establishments," strongly suggests that the terms "place of public accommodation" and "place of entertainment" should not be defined to include membership organizations which do not operate from a particular site or facility. MCAD is also consistent with the manner in which federal courts have applied Title II to membership organizations. As noted above, the Court has been unable to locate any federal case which has addressed the significance of the term "place" in Title II and whether a membership organization per se can be deemed a place of public accommodation. Nonetheless, several federal cases offer clues which indicate that a membership organization must operate from a concrete facility of the types identified in Title II in order to be considered a place of public accommodation. For example, United States Slidell Youth Association, 387 F.Supp. 474 (E.D.La.1974), draws an implicit distinction between a membership organization and the physical facility it operates. The subject of Slidell was a youth football league which refused to admit African Americans as members. The league was organized in order to promote safety in youth football and to develop the physical, mental, and moral health of its youth members and instill in them a sense of fellowship, scholarship, and citizenship. See 387 F.Supp. at 476. Aside from being white, a boy needed only to be of a certain age and weight, pay a fee, and execute a waiver of liability in order to become a member of the league. See id. at 476-77. The league owned and operated a recreational facility which included two football fields, grandstands, and a concession stand. All football games played in the league were played at this facility, and the facility was used for this purpose alone and only by the league. See id. at 477.

In considering whether the government had established a pattern and practice of racial discrimination, the Slidell court focused upon the youth association itself. See 387 F.Supp. at 480-81. However, the court's attention shifted to the recreational facility operated by the association when it considered whether or not there was a "place of entertainment" within the scope of Title II. The court did observe that the *1532 association existed in order to provide community youth "the entertainment of playing football" and other community residents with the pleasure of watching the game played. Id. at 483. Yet, the court's ultimate finding was not that the association constituted a place of entertainment, but that the facility it operated was: [B]ecause participatory forms of entertainment are covered by 42 U.S.C. s 2000a(b)(3) and because playing football is one such form of entertainment, the facility owned, operated and maintained by SYFA to conduct its youth football program is a place of entertainment within the meaning of 42 U.S.C. s 2000a(b)(3YFA's facility is also covered as [a] place of entertainment under 42 U.S.C. s 2000a(b)(3) on the basis that it offers a form of spectator entertainment to the general public. The evidence in this case shows that members of the general public are admitted to the SYFA youth football games as spectators upon payment of an admission. Many of the improvements made by SYFA to its property to prepare the property for its football program centered around this aspect of the program: the food concession stand, the grandstands, the chain link fence. The statutory language of Section (b)(3) is very clear that "... sports arena[s] and stadiums" are intended to be included within that section, and the discussions of the scope of 42 U.S.C. s 2000a(b)(3) in the cases cited above all begin with the premise that places which offer a form of entertainment to the viewing public are within the scope of that section. Id. (emphasis supplied). See also id. at 484 ("it has been established that SYFA's recreational facility is a place of public accommodation within the meaning of 42 U.S.C. s 2000a et seq....") (emphasis supplied); id. at 486 (same). Similar reasoning has prevailed in courts which have held that local branches of the Young Men's Christian Association ("YMCA") were within the reach of Title II as "places of

entertainment" and therefore were prohibited from discriminating on the basis of race. Much like the Boy Scouts, the YMCA is an eleemosynary organization which promotes the moral and spiritual development of boys through a variety of recreational, educational, and spiritual activities. See Smith v. Young Men's Christian Association of Montgomery, Inc., 462 F.2d 634, 636 (5th Cir.1972); Nesmith v. Young Men's Christian Association of Raleigh, N.C., 397 F.2d 96, 99-100 (4th Cir.1968). Each of the local YMCA organizations at issue in these cases was in effect open to the public, requiring only that an individual wishing to join be white and pay an annual membership fee. See Smith, 462 F.2d at 648; Nesmith, 397 F.2d at 101. As in Slidell, the touchstone for the court's conclusion in these cases that Title II applied to the YMCA was the physical site at which the organization sponsored its activities. See Smith, 316 F.Supp. 899, 912 (M.D.Ala.1970) ("The record shows that each of the YMCA branches (excluding the Camp branch) offers numerous recreational activities, such as swimming, scuba diving, table tennis, basketball and tennis. The Camp branch offers such activities as swimming, boating, waterskiing, archery, and arts and crafts. Furthermore, the Association's recreational facilities include five gymnasiums, a health club and eight swimming pools.") (emphasis supplied), aff'd 462 F.2d at 648; Nesmith, 397 F.2d at 97 ("The issue presented by this appeal is whether the health and athletic facilities of the Young Men's Christian Association of Raleigh, Inc. are covered by Title II....") (emphasis supplied). This emphasis upon the facilities operated by the membership organization as the "place" of public accommodation is echoed, at least implicitly, in many other Title II cases. See generally Durham v. Red Lake Fishing & Hunting Club, 666 F.Supp. 954, 959 (W.D.Tex.1987) ("Courts have found places of entertainment to include health and beauty spas, golf clubs, bars and package stores, swimming pools, and athletic clubs.") (footnotes collecting cases omitted); United States v. Lansdowne Swim Club, 713 F.Supp. 785, 790 (E.D.Pa.1989), aff'd, 894 F.2d 83 (3d Cir. *1533 1990). See also, e.g., Auerbach v. African American Teachers Association, Inc., 356 F.Supp. 1046, 1048 (E.D.N.Y.1973) (white

teachers ejected from public meeting called by group organized to promote the education of African Americans had shown discrimination in a place of entertainment, where organization's meetings were held in a public school auditorium) [FN28]; Wesley v. City of Savannah, Georgia, 294 F.Supp. 698, 701-02 (S.D.Ga.1969) ("[i]t is conceded by the Savannah Golf Association that the Bacon Park Course is a place of public accommodation under the Civil Rights Act of 1964"; accordingly, annual golf tournament sponsored by this private association at the golf course was subject to Title II); Williams v. Rescue Fire Co., 254 F.Supp. 556, 563 (D.Md.1966) (skating arena and swimming pool built and operated by not-for- profit volunteer firefighting association constituted place of entertainment). Indeed, in a number of these cases, the courts have noted that the public facilities at issue had adopted the facade of a membership organization merely in order to circumvent Title II. See Daniel v. Paul, 395 U.S. 298, 302, 89 S.Ct. 1697, 1699, 23 L.Ed.2d 318 (1969) ("this 'membership' device seems no more than a subterfuge to avoid coverage of the 1964 Act"); Williams, 254 F.Supp. at 563 ("The so-called 'club' operation is an obvious subterfuge."); United States v. Johnson Lake Inc., 312 F.Supp. 1376, 1378, 1381 (S.D.Ala.1970) (recreational club was incorporated in 1964 after enactment of Title II and insisted upon display of membership cards only after suit was filed, leading court to conclude that the club had been formed principally as a means to exclude African Americans).

. Auerbach deals primarily with the question of whether a claim of unconstitutional state action could be asserted under 42 U.S.C. s 1983 based upon the group's use of public facilities. See 356 F.Supp. at 1048. Cf. Equal Access Act, 20 U.S.C. s 4071(c)(1), (5). A similar question might be raised regarding the Boy Scouts, to the extent its local affiliates promote and/or conduct their activities in public schools. See Tr. at 43 (testimony of Sandra Dixon); Tr. at 133, 519 (testimony of Boyd Ridley Critz, III); Tr. at 468-69 (testimony of James L. Valukas); Tr. at 581 (deposition testimony of William A. McCleery, III). No such contention has been made in this case, however, nor does the Court express any opinion as to this issue.

As the Massachusetts court noted in MCAD, cases like these stand for the proposition that a membership organization comes within the reach of Title II when membership serves as a "ticket" to a particular facility of the kinds set forth in the statute. See 463 N.E.2d at 1159. Although none of the federal cases goes so far as to say that a membership organization cannot qualify as a place of public accommodation absent such a tie to a particular facility, this Court believes MCAD was correct in extrapolating this principle from the legislature's use of the term "place" as well as the results in cases like Slidell and NOW v. Little League. This distinction between membership organizations and the facilities they operate comports with the ordinary understanding of "place" and with the categories of establishments expressly cited in the statute, while at the same time ensuring that such establishments cannot evade the statute simply by adopting the mantel of a membership organization. The distinction is also consistent with the private club exemption set forth in subsection (e) of the statute. That portion of the statute provides: The provisions of this subchapter shall not apply to a private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment within the scope of subsection (b) of this section. 42 U.S.C. s 2000a(e). Like MCAD, Congress itself, in enacting subsection (e), seems to have drawn a distinction between an organization, in this case a "private club," and the facilities it operates. Subsection (e), of course, does not purport to address large organizations like the Boy Scouts (which may or may not qualify as an organization "not in fact open to the public," a disputed matter the Court does not reach in this opinion); nonetheless, the fact that the statute recognizes a distinction between organizations per se and organizations *1534 which operate the sorts of facilities cited as "places of public accommodation" lends credence to MCAD 's "ticket" analogy. See U.S. Jaycees v. Iowa Civil Rights Commission, 427 N.W.2d at 455. [2][3] The legislative history of Title II, in contrast to the history of California's Unruh Act and some of the other state statutes which have been given a more expansive interpretation,

also points toward exclusion of organizations which do not have a physical site. It is appropriate to look beyond the statutory language and delve into the legislative history only when the statute is ambiguous or where a literal interpretation of the statute would produce a result which is absurd or contrary to the goals of the statute. United States v. Real Estate Known as 916 Douglas Ave., supra, 903 F.2d at 492. In view of the division among the state courts as to the appropriate interpretation of the term "place" in statutes comparable to Title II, arguably there is enough of an ambiguity in the federal act to invite resort to its) legislative history. However, even when a court does consider the legislative history of a statute, it must do so bearing in mind that the words of the act itself reflect congressional intent; that presumption is rebutted only in the rare circumstance in which the legislative history clearly reflects a purpose contrary to the ordinary meaning of the words used. Ardestani v. I.N.S., supra, 112 S.Ct. at 520 (citing I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 432 n. 12, 107 S.Ct. 1207, 1213 n. 12, 94 L.Ed.2d 434 (1987), and Rubin v. United States, 449 U.S. 424, 430, 101 S.Ct. 698, 701, 66 L.Ed.2d 633 (1981)). See also American Tobacco Co. v. Patterson, 456 U.S. 63, 68, 102 S.Ct. 1534, 1537, 71 L.Ed.2d 748 (1982); Richards v. United States, 369 U.S. 1, 9, 82 S.Ct. 585, 591, 7 L.Ed.2d 492 (1962). Here, a review of the legislative history does not demonstrate an intent to depart either from the common understanding of the term "place" or from the types of facilities expressly cited as examples of places of public accommodation and places of entertainment. To the contrary, the legislative history confirms the notion that Congress meant the terms "place of public accommodation" and "place of entertainment" to be construed consistently with the ordinary meaning of those terms. The legislative history of Title II has been described as "inconclusive" and "obscure" insofar as it concerns the intended reach of the statute. See Miller v. Amusement Enterprises, Inc., 394 F.2d 342, 349 (5th Cir.1968) (en banc). Nonetheless, that history supplies a number of clues which suggest that Congress did not intend for membership organizations lacking ties to a tangible place or facility to be treated as "places" of public accommodation. It bears noting first that in contrast

to the House bill which was eventually enacted, Section 4 of the Senate bill, S. 1732, included a ban upon discrimination with respect to membership in labor unions as well as professional, business, or trade associations and organizations. See S.Rep. No. 872, 88th Congress, 2d Sess. (1964), reprinted in 1964 U.S.C.C.A.N. 2355, 2359. In this sense, the House bill which was to become Title II was far narrower in scope. See 110 Cong.Rec. 6533 (March 30, 1964) (remarks of Sen. Humphrey) ("The reach of that title is much narrower than when the bill was first introduced. It is also narrower than S. 1732, the bill reported by the Senate Commerce Committee, which covers the general run of retail establishments, membership in labor unions, and so forth."); see also 110 Cong.Rec. 7397 (April 9, 1964) (remarks of Sen. Magnuson). Indeed proponents of the bill repeatedly emphasized its limited scope. See, e.g., 110 Cong.Rec. 6533 (March 30, 1964) (remarks of Sen. Humphrey) ("The bill deals with the practical problems we face. This is a bill of limitation and restraint. It is a reasonable proposal. It is directed to specific, known, abuses."); id. at 6534 ("Title II, like the bill as a whole, is designed to reach the most significant manifestations of discrimination. It is carefully drafted and moderate in nature. There is no desire to regulate truly personal or private relationships."); 110 Cong.Rec. 8253 (April 17, 1964) (remarks of Sen. Prouty) ("Equal access to public accommodations involves few new jurisprudential concepts.") See also *1535 110 Cong.Rec. 8344 (April 18, 1964) (remarks of Sen. Proxmire); 110 Cong.Rec. 1629 (February 1, 1964) (remarks of Rep. Halpern). Moreover, throughout the debates upon the bill, when referring to the kinds of facilities which would be considered "places of public accommodation," members of Congress simply echoed the list of covered establishments expressly identified in the bill—e.g. hotels and motels, restaurants, etc.—without any acknowledgment that the bill might reach other kinds of establishments or organizations. See, e.g., 110 Cong.Rec. 6533 (March 30, 1964) (remarks of Sen. Humphrey) ("The business enterprises covered by section 201 include hotels and motels..., restaurants and lunch counters, ... gasoline stations, and motion-picture houses, theaters, sports arenas, and other

public places of exhibition or amusement. These are the establishments covered by title II."); id. at 6534 ("I should like to emphasize that the establishments covered are very clearly described in section 201(b)."); id. at 6356; 110 Cong.Rec. 6557 (March 30, 1964) (remarks of Sen. Kuchel) ("The House-passed bill does not in title II cover all places of public accommodation, but it does cover those establishments whose discriminatory practices, when they have occurred, have resulted in great distress and anguish. Specifically, the bill expressly provides that all persons shall have access to the following places of public accommodation without regard to race, color, religion, or national origin: places of lodging, such as hotels, and motels ...; eating establishments; places of amusement such as theaters and sports arenas; [and] gasoline stations...."); 110 Cong.Rec. 7404 (April 9, 1964) (remarks of Sen. Magnuson) (citing examples of places of entertainment); id. at 7410 ("Simply stated, the bill merely seeks to establish the right of all persons, without regard to race, color, religion, or national origin, to the full and equal enjoyment of the services and facilities of a variety of places of business serving the general public."). Again, lawmakers stressed the limited nature of the bill. See 110 Cong.Rec. 1640 (February 1, 1964) (remarks of Rep. Senner) ("Title II is moderate legislation. It invades no man's privacy and compels no personal or confidential relationships. It deals only with places which have traditionally held out services and facilities to the general public."); 110 Cong.Rec. 1926 (February 4, 1964) (remarks of Rep. Moorehead) ("[T]itle II is not a radical change, it merely expands the ancient and familiar rule with respect to inns to such places as restaurants, gasoline stations, and places of exhibition or entertainment, as has been done by some 31 States and the District of Columbia."). See also 110 Cong.Rec. 12614 (June 3, 1964) (remarks of Sen. Muskie); 110 Cong.Rec. 7785 (April 13, 1964) (remarks of Sen. Smathers); 110 Cong.Rec. 7383 (April 9, 1964) (remarks of Sen. Young); 110 Cong.Rec. 1511 (remarks of Rep. Madden). Indeed, proponents of the bill repeatedly stressed the fundamental right to unrestrained interstate travel and the economic significance of interstate commerce

in explaining why it was important that these types of facilities not be permitted to discriminate. See, e.g., 110 Cong.Rec. 1642 (February 1, 1964) (remarks of Rep. Ryan) ("For the white person traveling from State to State, the road is a series of familiar landmarks. Frequently his most difficult problem is to choose among the array of establishments offering food, lodging, and respite. But for the Negro traveler, the road may be more like a desert and each inviting sign a mirage or, worse yet, a humiliating rebuff to him, his family or companions."); 110 Cong.Rec. 6528, 6535 (March 30, 1964) (remarks of Sen. Humphrey) ("the lack of facilities at which to rest and at which to eat is a substantial impediment to interstate travel and commerce"); 110 Cong.Rec. 6557 (March 30, 1964) (remarks of Sen. Kuchel) ("There can be no question but that segregation in public accommodations obstructs and restricts interstate travel and the sale of related goods and services. The market for national entertainment such as community concerts, athletic competitions and motion pictures is surely restricted by such a local situation. National industries seeking new *1536 sources of manpower and availability to growing urban markets are inhibited from locating their offices and plants in areas where racial strife is likely to occur."); 110 Cong.Rec. 7397, 7398, 7412-13 (April 9, 1964) (remarks of Sen. Magnuson). See also id. at 7402; S. Report 872, supra, 1964 U.S.C.C.A.N. at 2371-72; 110 Cong.Rec. 8343 (April 18, 1964) (remarks of Sen. Proxmire); 110 Cong.Rec. 1594 (February 1, 1964) (remarks of Rep. Farbstein). Opponents of the bill in turn argued that the bill represented an intrusion upon the property rights of business owners, and as such constituted a violation of the Fifth Amendment. See House of Representatives Minority Report Upon Proposed Civil Rights Act of 1963, Committee on Judiciary Substitute for H.R. 7152, 88th Cong., 2d Sess., reprinted in 1964 U.S.C.C.A.N. 2431, 2441 ("Places of 'public accommodation' do not cater by custom to one race in preference to another solely from proprietary preference. People are in business to make money and in certain areas they have learned, or have reason to believe, it is more profitable to serve only one race or another.... A host follows the customs of his community else he

suffers, economically. To force him to abandon his practice, to run counter to prevailing opinion, is to injure his business and his property."); 110 Cong.Rec. 1606 (February 1, 1964) (remarks of Rep. Dorn) ("Title II will give the Attorney General gestapo power over hotels, motels, restaurants, cafeterias, lunchrooms, gasoline stations, and so forth. This section is a most sinister and calculated attack upon property rights."); 110 Cong.Rec. 7756 (April 13, 1964) (remarks of Sen. Holland) ("[T]he owners of the thousands of fine hotels, motels, restaurants, boarding houses, and so forth, might be deprived of their constitutional rights to manage their own businesses which they have built up by hard work, sacrifice, and investment of their own hard earned money.... [E]nactment of this vicious, socialistic legislation strikes at the very heart of the Constitution upon which this Republic was founded and upon which our basic system of private enterprise, which we hold so high, lives and thrives."); 110 Cong.Rec. 7784, 7786 (April 13, 1964) (remarks of Sen. Smathers, quoting congressional testimony of Florida Gov. Bryant) ("We are dealing here today with property rights.... The debate in which we are now engaged is over the assertion of a new right: The right of nonowners of property to appropriate it from the owners."); 110 Cong.Rec. 12700 (June 4, 1964) (remarks of Sen. Byrd) ("Title II constitutes a radical departure from established constitutional principles, and would constitute an invasion of the property rights of owners of privately owned establishments.") See also 110 Cong.Rec. 8081-82 (April 15, 1964) (remarks of Sen. Ervin); 110 Cong.Rec. 8356 (April 18, 1964) (remarks of Sen. Eastland); 110 Cong.Rec. 5958 (March 23, 1964) (remarks of Sen. Thurmond); 110 Cong.Rec. 2791 (February 10, 1964) (remarks of Rep. Grant); 110 Cong.Rec. 1988 (February 5, 1964) (remarks of Rep. Whitten); 110 Cong.Rec. 1977 (February 5, 1964) (remarks of Rep. Fuqua); 110 Cong.Rec. 1629 (February 1, 1964) (remarks of Rep. Andrews); 110 Cong.Rec. 1618 (February 1, 1964) (remarks of Rep. Abernethy); 110 Cong.Rec. 1617 (February 1, 1964) (remarks of Rep 110 Cong.Rec. 1611 (February 1, 1964) (remarks of Rep. Sikes). Thus, the legislative history demonstrates an understanding that Title II would reach only the types of businesses

commonly understood to be places of public accommodation. Without question, opponents of the bill perceived it as a radical measure. See, e.g., 110 Cong.Rec. 2791 (February 10, 1964) (remarks of Rep. Grant) ("This could well be the Appomattox of constitutional liberties for all Americans."); 110 Cong.Rec. 6071 (March 24, 1964) (remarks of Sen. Long) ("this radical legislation would create a whole pack of wolves to be used against the rights of individual Americans"); 110 Cong.Rec. 3713 (February 26, 1964) (remarks of Sen. Ervin) ("This bill constitutes the most drastic assault on constitutional government ever proposed in the history of our Nation."); 110 Cong.Rec. 2472 (February 7, 1964) (remarks of Rep. Matthews) ("Title II, the so-called public accommodations provision *1537 of the bill, is the most brazen attempt to impose Federal authority directly on private citizens and private property since the ill-fated Civil Rights Act of 1875."). However, their concern focused upon the intrusion into the operation of businesses like restaurants and hotels, not membership organizations like the Jaycees or the Boy Scouts. See, e.g., 110 Cong.Rec. 3713-14 (February 27, 1964) (remarks of Sen. Ervin) ("It seems to me that the Federal Government should devote its attention to something more important than telling shoeshine boys whose shoes they should shine.") At the same time, proponents of the bill stressed that it was a moderate measure designed to address the denial of access to public facilities which had contributed to the racial strife which confronted the nation. See, e.g., 110 Cong.Rec. 8062 (April 15, 1964) (remarks of Sen. Johnston) ("The list of businesses expressly covered by the title consists of places of public accommodation in which racial discrimination is particularly humiliating and causes the greatest inconvenience. Moreover, the list focuses on situations in which congressional action can clearly produce prompt and significant relief."); see also pages 1535-36, supra. There is no hint in the legislative history that Title II would be construed so broadly as to reach membership organizations which had little or no connection to the sorts of facilities normally thought of as places of public accommodation. See 110 Cong.Rec. 7406 (April 9, 1964) (remarks of Sen. Magnuson) ("Performances produced by private organizations,

like fraternal groups, in places to which the public is not invited are outside the scope of Title II.");
\id. at 7407 ("Service or professional establishments would not generally be covered unless they are physically located within the premises of a covered establishment and hold themselves out as serving the patrons thereof."). Thus, this is not a case in which the legislative history of the statute merely fails to establish a clear intent contrary to the ordinary meaning attached to Title II's terminology. Cf. United States v. Johnson Lake Inc., supra, 312 F.Supp. at 1380 ("The word 'entertainment' as used in [42 U.S.C. s 2000a(b)(3)] was intended to carry its ordinary meaning....") Instead, the history of the act tends to confirm that Title II was not meant to be so sweeping a measure as to reach membership organizations per se. [4] The Court is cognizant of the fact that Title II is to be construed liberally and that its language should not be interpreted so narrowly as to conflict with the statute's remedial aim. See, e.g., Miller v. Amusement Enterprises, Inc., supra, 394 F.2d at 349 ("We do not read [Title II] CT. with narrowed eye but with open minds attuned to the clear and strong purpose of the Act, namely, to secure for all citizens the full enjoyment of facilities described in the Act which are open to the general public."). In particular, the Court recalls the admonition of the majority in Daniel v. Paul, supra, 395 U.S. at 308, 89 S.Ct. at 1702, regarding the proper construction of the term "place of entertainment": In light of the overriding purpose of Title II "to [re]move the daily affront and humiliation involved in discriminatory denials of access to facilities ostensibly open to the general public," H.R.Rep. No. 914, 88th Cong., 1st Sess., 18, we agree with the en banc decision of the Court of Appeals for the Fifth Circuit in Miller v. Amusement Enterprises, Inc., 394 F.2d 342 (1968), that the statutory language "place of entertainment" should be given full effect according to its generally accepted meaning.... (Emphasis in original.) See Welsh, 742 F.Supp. at 1419; Lansdowne Swim Club, 713 F.Supp. at 790. Thus, the Court recognizes that an establishment may qualify as a "place of entertainment" for purposes of Title II even though it is not among those expressly cited in the statute. See Miller, 394 F.2d at 350

("Although we recognize that ejusdem generis is an old and accepted rule of statutory construction, we do not believe that it compels us to accord words and phrases embodied in the statute a definition or interpretation different from their common and ordinary meaning; or that the rule requires us to interpret the statute in such a narrow fashion as to defeat what we *1538 conceive to be its obvious and dominating general purpose."); United States v. DeRosier, 473 F.2d 749, 752 (5th Cir.1973) (neighborhood bar qualified as "place of entertainment" although it was unlike the establishments cited in the statute). In Daniel, the Supreme Court held that the Lake Nixon Club, an amusement park located near Little Rock, Arkansas, qualified as a "place of entertainment" under 42 U.S.C. s 2000a(b)(3). As the Fifth Circuit had in Miller, the Court rejected the Club's argument that it was unlike any of the other establishments listed in Subsection (b)(3) because it offered participatory, rather than spectator, amusement. 395 U.S. at 306-08, 89 S.Ct. at 1701-02. See Miller, 394 However, there comes a point at which giving the statutory language its "full effect according to its generally accepted meaning" will result in the exclusion of certain establishments which do not conform to the ordinary understanding of the term "place of entertainment." This is such a case. There may well be merit to the contention that the principal focus of statutes like Title II is upon the denial of access to accommodations rather than upon the concept of "place." See Kiwanis International v. Ridgewood Kiwanis Club, supra, 627 F.Supp. at 1387 (D.N.J.); Power Squadrons, 465 N.Y.S.2d at 875-76; Quinnipiac Council, 528 A.2d at 358. See also Welsh, 742 F.Supp. at 1420-21. However, the Court is not free to disregard the plain language Congress has used or the ordinary meaning of that language. Congress enacted a law addressing the "place of public accommodation"; and it did not define that term in such a way as to signal a departure from the usual connotations of that phrase. It did not define the term as "any establishment which caters or offers its services or facilities or goods to the general) public," (see Quinnipiac Council, 528 A.2d at 358); nor as "all business establishments of every kind whatsoever" (see Isbister v.

Boys' Club of Santa Cruz, Inc., 40 Cal.3d 72, 219 Cal.Rptr. 150, 153, 707 P.2d 212, 215 (1985); Curran, 147 Cal.App.3d 712, 195 Cal.Rptr. at 334-36); nor as "a business, accommodation, refreshment, entertainment, recreation, or transportation facility of any kind" (see McClure, 305 N.W.2d at 766); nor as "any establishment or person," with the term "person" defined to include "one or more individuals, partnerships, associations, [or] organizations, ..." (see Israel v. West Virginia Secondary Schools Activities Commission, 182 W.Va. 454, 388 S.E.2d 480, 488 (1989) (distinguishing Title II)). Congress instead chose to highlight the concept of place by listing as examples establishments which possess concrete locations and facilities, and, in the particular provision at issue here, by rendering the statute applicable to "other places of ... entertainment." 42 U.S.C. s 2000a(b)(3). Cf. Hatheway v. Gannett Satellite Information Network, Inc., 157 Wis.2d 395, 459 N.W.2d 873 (Wis.App.1990) (newspaper which refused classified advertisement from gay/lesbian organization did not constitute a "public place of accommodation" within scope of Wisconsin accommodation statute, because newspaper was dissimilar to types of places listed in statute). [FN30]

FN30. See generally United States v. Thomas, 930 F.2d 526, 529 (7th Cir.), cert. denied, — U.S. ——, 112 S.Ct. 171, 116 L.Ed.2d 134 (1991), and Alschuler v. Department of Housing and Urban Development, 686 F.2d 472, 488 (7th Cir.1982), employing similar ejusdem generis rationale.

The Boy Scouts, lacking a connection to a particular site or facility, does not qualify as such a place. Although both BSA and the Council may have certain administrative offices and do sponsor certain events at locations which might be thought of as places of public accommodations (e.g., public campgrounds), access to these sites is not really at issue here. The dispute instead is one over access to the Boy Scouts as an organization and to the full range of its activities, many (if not most) of which do not take place at such locations. In and of themselves, neither the Council nor BSA constitute "places" within the meaning of Title II. Nor does the fact that the majority of scouting activities take place at some identifiable place in the generic

sense—in a home, a church, a museum, or a Show Biz Pizza parlor, to cite but a few examples—render the Boy Scouts a "place" for purposes of Title II. Certain courts have suggested *1539 otherwise. See McClure, 305 N.W.2d at 772 ("[i]f we were to look for mobile sites of the national organization's 'business facilities' we would find them in the sometimes door-to-door, company-to-company solicitation of members for the organization, and we would find them in the oft-shifted sites at which the affiliated local chapters hold meetings ..."); see also Ridgewood Kiwanis Club, 627 F.Supp. at 1387 ("[b]ecause Kiwanis conducts its meetings in just such places,—i.e., public restaurants—[this] court concludes that the New Jersey Supreme Court would be prepared to find that the statutory 'place' requirement has been met ..."), rejected, 806 F.2d at 474. However, for the Court to deem the Boy Scouts a "place" simply because it conducts its activities at identifiable locations) would attribute a sweeping scope to the term "place of public accommodation" completely inconsistent with its ordinary meaning. Private homes, for example, are rarely thought of as places of public accommodation (except perhaps by parents exasperated by the comings and goings of their prodigal adolescent offspring); and to use the family home as the site which triggers Title II coverage would raise serious constitutional concerns. Lending further support to the conclusion that the Boy Scouts does not amount to a "place of public accommodation" within the scope of Title II is the fact that the primary benefits of membership in the organization flow not from access to or the use of a particular facility, but from the interaction and companionship amongst the boys and the adult volunteers. Organizations like the YMCA or Boys' Club, for example, have in common with the Boy Scouts the aim of fostering the mental, physical, and spiritual development of boys. Yet, unlike the Boy Scouts, the YMCA and Boys' Club work toward that goal in substantial part through a variety of programs and activities which center upon a concrete recreational facility embraced by the ordinary meaning of a "place of public accommodation" and a "place of entertainment" in particular. Having reviewed the body of evidence presented in this case, this Court is convinced that it would not

particularly matter whether a Cub Scout den met in a club house, in a living room, or in a garage. The kinds of activities in which Boy Scout, Cub Scout, and Tiger Cub groups typically engage are not dependent upon the accoutrements of any particular location, let alone of a facility one would normally think of as a place of public accommodation. Rather, the success of the Boy Scouts, and the attraction to boys and their parents alike, lies in the sense of community among its participants. In a similar vein, the Boy Scouts has argued that it does not qualify as a "place of entertainment," because the true sources of entertainment in the organization are its members and volunteers and the interaction between them, rather than any recreational equipment or other goods which have moved in interstate commerce. See 42 U.S.C. s 2000a(b) ("[e]ach of the following establishments which serves the public is a place of public accommodation within the meaning of this subchapter if its operations affect commerce ..."); 2000a(c) (a place of exhibition or entertainment under subsection (b)(3) affects commerce if "it customarily presents films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce"). Because the Court concludes that the Boy Scouts does not constitute a "place of entertainment" as plaintiffs have contended, it need not and does not reach the question of whether the organization "customarily presents ... sources of entertainment which move in commerce." Thus, for example, the Court need not consider whether it is enough to satisfy the interstate commerce requirement of Title II that the Boy Scouts makes use of "fun books," uniforms, camping and hiking equipment, and other goods which may have moved in interstate commerce, even though these items may be incidental to the "entertainment" which the Boy Scouts offers. For present purposes, the Court merely notes its agreement with the proposition that the benefits of participation in the Boy Scouts stem not from access to particular places *1540 or goods, but from the fellowship among Scouts and the adult volunteers. In analytical terms, the Court also believes that excluding an organization like the Boy Scouts, whose activities and memberships lack a tie to the sorts of facilities cited in Title II as places of public accommodation,

represents a prudent stopping point. For where the benefits of membership in an organization flow primarily, if not exclusively, from the interpersonal association among the people who belong to the organization rather than the enjoyment of the physical accoutrements of a particular facility, the rival interests implicated by exclusion of an individual from the group become more difficult to resolve. As set forth above, when Congress enacted Title II, it sought to ensure that everyone, regardless of their race, color, religion, or national origin, would have access to the public facilities which were necessary to everyday travel, sustenance, and recreation. Perhaps not so differently from the Boy Scouts today, some opponents of the act contended that integration of such public accommodations would interfere with their desire to associate with persons of their own choosing. See, e.g., 110 Cong.Rec. 12700 (June 15, 1964) (remarks of Sen. Byrd) ("The right to exclusiveness, like the right to privacy, is essential to freedom, and no one is legally aggrieved by the exercise of that right."); see also Additional Views on H.R. 7152 of Hon. William M. McCulloch, et al., 88th Congress, 2d Sess. (1964), reprinted in 1964 U.S.C.C.A.N. 2487, 2495 (rejecting this line of argument). To whatever degree Congress might have found the assertion of such an interest to be valid, plainly it concluded that the interest in eradicating invidious discrimination in places of public accommodation outweighed any associational interest the owners and patrons of such establishments might assert. See id. However, there is no evidence that Congress struck the same balance vis a vis the membership organization which is divorced from any particular facility or location. In the context of such an organization, where the selection of one's companions is less fortuitous and (at least from the Boy Scouts' point of view) depends to a significant degree upon the individual's affinity with the group's values and goals, the competing interests raise more nettlesome questions. Of course, the Court is fully aware that Title II's private club exemption and the First Amendment defenses which are frequently raised in public accommodations cases supply a vehicle for resolution of these competing concerns. Indeed, the Boy Scouts has invoked these very defenses here, and the Court could and would reach them if it were

necessary to do so. However, given the resolution of this case, the Court expresses no opinion on the merits of these defenses. The Court merely cites the clash between individual and associational rights which is highlighted in the context of this case—where the benefits of membership result exclusively from interpersonal relationships rather than the use of particular facilities—as yet another signal that entities like the Boy Scouts are almost certainly beyond the realm of establishments which Congress intended to reach through Title II. The terms of Title II simply do not permit application of its provisions to membership organizations like the Boy Scouts, which do not operate a facility of the kinds referenced in the statute. Absent congressional action which would bring membership organizations per se within the scope of the federal public accommodations statute, the Boy Scouts may select its membership according to its own criteria and conscience.

V. CONCLUSIONS OF LAW

1. The Court has jurisdiction over this case pursuant to 42 U.S.C. s 2000a- 6 and 28 U.S.C. s 1331. 2. Title II of the Civil Rights Act of 1964, 42 U.S.C. s 2000a provides, in relevant part, as follows (a) All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination *1541 or segregation on the ground of race, color, religion, or national origin. (b) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this subchapter if its operations affect commerce, or if discrimination or segregation by it is supported by State action: (3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; .. (c) The operations of an establishment affect commerce within the meaning of this subchapter if ... (3) in the case of an establishment described in paragraph (3) of subsection (b) of this section, it customarily presents films, performances, athletic teams, exhibitions,

or other sources of entertainment which move in commerce;.... For purposes of this section, "commerce" means travel, trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia and any State, or between any foreign country or any territory or possession and any State or the District of Columbia, or between points in the same State but through any other State or the District of Columbia or a foreign country. .... [5] 3. In order to qualify as a "place of public accommodation" within the scope of Title II, an establishment must have a substantial connection to a concrete facility or location. 4. Membership organizations per se, which do not operate from or supply access to a particular facility or location, do not qualify as "places of public accommodation" within the meaning of Title II. 5. Defendants BSA and the Council constitute neither a "place of entertainment" nor any other kind of "place of public accommodation" within the scope of Title II, as they do not operate from or avail their members of access to a particular facility or location. 6. Accordingly, defendants are entitled to final judgment in their favor on both counts of plaintiffs' first amended complaint.

VI. CONCLUSION

For all of the reasons set forth above, upon review of the relevant authorities and the evidence presented at trial, the Court concludes that because defendants Boy Scouts of America and Boy Scouts of America West Suburban Council No. 147 do not operate from or provide access to particular locations or facilities, they do not qualify as "places of entertainment" or any other kind of "places of public accommodation" within the meaning of Title II of the Civil Rights Act of 1964, 42 U.S.C. s 2000a. Accordingly, the Court enters final judgment in favor of the defendants on both counts of plaintiffs' first amended complaint.

APPENDIX C

IN THE

United States District Court for the Northern District of Illinois Eastern Division

MARK G.A. WELSH, a minor, and Elliott A. Welsh, his father and next friend,

Plaintiffs,

v.

Case No. 90 C 1671

BOY SCOUTS OF AMERICA and BOY SCOUTS OF AMERICA WEST SUBURBAN COUNCIL #147,

Defendants.

MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

ROVNER, District Judge.

*1 Plaintiffs Mark G.A. Welsh and his father Elliott A. Welsh filed this action against the Boy Scouts of America and the Boy Scouts of America West Suburban Council No. 147 (collectively, the "Boy Scouts") after being denied membership in the Boy Scouts because of their unwillingness to profess a belief in a Supreme Being or God. Plaintiffs contend that the Boy Scouts' insistence upon such a profession constitutes discrimination on the basis of religion by a place of public accommodation in violation of Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a.[1] Pending before the Court is plaintiffs' motion for summary judgment on all aspects of their Title II claim, or in the alternative, for partial summary judgment finding that plaintiffs have made out a prima facie case of discrimination under Title II. For the reasons set forth below, the Court denies plaintiffs' motion.

II. ANALYSIS

A. Background

On August 9, 1990, this Court denied defendants' motion to dismiss the complaint for failure to state a claim upon which relief could be granted. Welsh v. Boy Scouts of America, 742 F.Supp. 1413 (N.D.Ill.1990) (Rovner, J.). In that opinion, the Court rejected defendants' contentions that, as a matter of law, (1) the Boy Scouts cannot be characterized as a place of public accommodation, (2) that the Boy Scouts is a private club exempt from the provisions of Title II, and (3) that application of Title II to the Boy Scouts would impermissibly infringe upon its members' First Amendment rights of the free exercise of religion and of intimate and expressive association. In seeking summary judgment, plaintiffs now ask the Court to broaden its prior ruling and affirmatively hold, on the evidentiary record presently before it[2] (1) that the Boy Scouts is a place of public accommodation, (2) that the Boy Scouts discriminates on the basis of religion, (3) that the Boy Scouts is not a private club exempt from Title II's provisions, and (4) that application of Title II to the Boy Scouts would not impermissibly interfere with its members' First Amendment freedoms. Plaintiffs have raised a number of arguments in support of their motion, and the Court need only briefly summarize these arguments here. First, based primarily upon Boy Scouts literature and certain deposition testimony given by Boy Scouts officials, plaintiffs maintain that the Boy Scouts is open to the public, affects interstate commerce, and is a place of entertainment, thus rendering it a place of public accommodation within the scope of Title II.[3]

At a minimum, plaintiffs contend, this evidence (together with defendants' admission that plaintiffs would have been considered for membership had they been willing to acknowledge a duty to God) entitles them to a finding that they have established a prima facie case of discrimination under Title II. Plaintiffs further argue that the Boy Scouts does not qualify for the private club exemption from Title II, because it is not genuinely selective in choosing members, it receives significant community funding, it regularly permits the participation of non-members in its activities, and it engages in public advertising and recruitment. Finally, plaintiffs argue that application of Title II's proscription of religious discrimination to the Boy Scouts would not impinge upon its members' First Amendment rights of intimate and expressive association. Plaintiffs reason that no right of intimate association is implicated because the Boy Scouts is an extremely large organization and is not genuinely selective in choosing its members. As to the right of expressive association, plaintiffs maintain that there is a lack of evidence that the Boy Scouts engages in any expressive activity with which the admission of atheists or agnostics would interfere. Even assuming the Boy Scouts could demonstrate such interference, plaintiffs assert, the government's compelling interest in eliminating discrimination would outweigh the organization's interest in free expression.[4]

*2 The Boy Scouts vigorously takes issue with each of these assertions. It argues first that evidence concerning the recreational aspects of the Boy Scouts, upon which plaintiffs rely in characterizing the organization as a place of entertainment, is taken out of context. The Boy Scouts maintains that it is not an institution which sells entertainment to the public, but a volunteer movement which seeks to instill social values in boys through a program of activities which happens to include recreational activities and through intimate associations among the members, their families, and the "dens"

of six to eight boys through which the Boy Scouts conducts many of its activities. Defendants next argue that plaintiffs have failed to establish a nexus between the Boy Scouts' activities and interstate commerce, because plaintiffs have not demonstrated that the organization "customarily presents films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce" as set forth in 42 U.S.C. § 2000(c)(3). With respect to Title II's private club exemption, the Boy Scouts maintains, inter alia, that it is a genuinely selective organization, limited (with respect to Tiger and Cub Scouts) to boys who fall within a narrow age range and who "subscribe to its fundamental values and purposes"; that governance of the organization is controlled by its membership; that the Boy Scouts' occasional use of public facilities and the opportunity for members' families to attend certain Scouting activities does not render the organization public in nature; that the Boy Scouts adheres to the formalities of a membership organization; that the history of the organization supplies no evidence of an attempt to circumvent the civil rights laws; and that the Boy Scouts is not a profit-oriented enterprise. As to the constitutional aspects of the case, the Boy Scouts argues that the admission of atheists or agnostics would impermissibly infringe upon its members' right of expressive association because "belief in God is and always has been central to BSA's principles and purposes," and "[p]ledging belief in God is indispensable to membership in the world-wide Scout Movement." (Defendants' Mem. at 17.) The Boy Scouts further argues that because the activities of its Cub Scouts program take place primarily through local dens which are small in size, and because relationships among Cub Scouts are founded upon shared beliefs and identification with other like-minded individuals, the freedom of intimate association bars the forced admission of individuals, like plaintiffs, who do not share a belief in and an obligation to God. Finally, emphasizing that the Boy Scouts has a true and sincere religious purpose, the Boy Scouts argues that the government lacks a compelling interest in restricting the organization's membership criteria and that neither the government nor the Court can traverse the boundary between church and state by attempting to police the Boy Scouts' determination as to which world views are

compatible with the group's purpose and which are not.

B. Rationale

*3 The party moving for summary judgment bears the burden of establishing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *New Burnham Prairie Homes, Inc. v. Village of Burnham*, 910 F.2d 1474, 1477 (7th Cir.1990); Fed.R.Civ.P. 56(c). The Court's role in reviewing the motion for summary judgment is not " 'to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.' " *Renovitch v. Kaufman*, 905 F.2d 1040, 1044 (7th Cir.1990), quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 2511 (1986). Moreover, the Court must view the facts and all reasonable inferences which may be drawn from them in a light most favorable to the non-movant, and where there are doubts as to whether a genuine factual dispute exists, the Court must resolve them in favor of the non-movant. *New Burnham Prairie Homes*, 910 F.2d at 1477. Applying these rules to the case at hand, the Court finds that there are genuine issues for trial which preclude summary judgment, even partial summary judgment with respect to a prima facie showing of discrimination under Title II. There is no dispute as to the chain of events which led up to this suit; the Boy Scouts admits that plaintiffs were excluded from the organization because they were unwilling to acknowledge a duty to God. Consequently, this is not a case in which summary judgment must be denied because there is a conflict between the accounts of a critical event, for example, and the question of whom to credit must be left to the trier of fact. Instead, this case is to a great extent one about the Boy Scouts' nature, its conduct, its true purposes, and its methods of achieving them. Only in resolving these factual questions can the Court decide the particular issues posed by this suit: Is the Boy Scouts a public accommodation subject to the provisions of Title II? Is it by nature so private that it may be deemed exempt from the statute? Is the nature of the association among its members sufficiently intimate or expressive that the admission of agnostics or atheists would intrude upon the members' First Amendment freedoms? In part, these are legal inquiries guided by a substantial body of case

law. See Welsh, 742 F.Supp. 1413. At the same time, however, their determination requires a decision as to which evidence to credit--a decision which generally must be reserved for trial. Plaintiffs, for example, rely upon evidence (much of it drawn from Boy Scouts literature) which emphasizes the fun, recreational aspects of the Boy Scouts. Based upon this evidence, they argue that the organization furnishes entertainment and thus qualifies as a public accommodation. Defendants, on the other hand, point to evidence which indicates that the recreational aspects of the Boy Scouts must be viewed simply as a means to an end--the instillment of important social values in male youths. Whose view of the Boy Scouts is correct, and where the organization fits on the spectrum of institutions to which Title II may or may not apply, cannot be resolved upon a cold record. The literature, affidavits, and deposition testimony which the parties have submitted to the Court adequately support their respective views of the Boy Scouts; but only in hearing live testimony, tested by cross-examination, can the Court finally decide whose view to credit. Other courts and litigants would appear to have reasoned similarly, given that the bulk of comparable cases have been decided upon trial rather than summary judgment.[5] Given the factual questions presented as to such threshold determinations as to whether the Boy Scouts constitutes a public accommodation within the scope of Title II, even partial summary judgment holding that plaintiffs had established a prima facie case of discrimination of the type reached by Title II would be inappropriate. Accordingly, plaintiffs' motion for summary judgment must be denied.

III. CONCLUSION

*4 For the reasons set forth above, plaintiffs' motion for summary judgment or, in the alternative, for partial summary judgment finding that plaintiffs have established a prima facie case of discrimination, is denied.

Trial will commence as scheduled on June 10, 1991 at 9:30 a.m. Based upon the prior representations of counsel for both sides that the trial would not exceed 10 days, with the average trial day comprising four and one-half hours, the Court will set aside a maximum of 10 trial days for the trial: June 10, 11, 12, 13, 14, 17, 18, 19, 27 and 28, 1991. By separate order, the Court will direct the parties to prepare and submit a pretrial order no later than May 22, 1991. The Court will treat the briefs which the parties have filed with regard to plaintiffs' motion for summary judgment as their trial memoranda. The Court will conduct a pre-trial conference on May 27, 1991 at 4:30 p.m.

APPENDIX D

IN THE

United States District Court for the Northern District of Illinois Eastern Division

MARK G.A. WELSH, a minor, and Elliott A. Welsh, his father and next friend,

Plaintiffs,

v.

Case No. 90 C 1671

BOY SCOUTS OF AMERICA and BOY SCOUTS OF AMERICA WEST SUBURBAN COUNCIL #147,

Defendants.

MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

Plaintiffs have been denied membership in the Boy Scouts on the sole ground that they are unwilling to profess a belief in a Supreme Being or God. In their attempt to gain membership in the Boy Scouts, they have brought this lawsuit pursuant to Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a, which prohibits places of public accommodation from discriminating on the basis of certain criteria, including religion, which Congress has determined are inappropriate.[1]

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[1]Whether the Boy Scouts may exclude individuals who do not profess a belief in God is a highly emotional question. For this very reason, however, it is important to assess such a case in terms of reasoned legal principles. The emotional nature of the desire on the part of some to avoid association with those who are different may merely illustrate better than any statute or legal opinion ever can the extent to which certain types of discrimination have become ingrained in our culture. Furthermore, it is in just these types of cases, where the discrimination is so ingrained, that the effective utilization of civil rights laws is most important. Cases involving allegations of racial and gender-based discrimination, while now commonplace, rarely provoke the expressed defense that such discrimination is justified. In contrast, religious discrimination--including discrimination against those who do not believe in God--remains openly defended by some in a way that most of our society no longer tolerates with respect to other forms of discrimination. This is true even though the concerns underlying the prohibition of religious discrimination stem from the Bill of Rights itself. The United States of America was founded on the concept of tolerance for differing beliefs with respect to religion, and the survival of this concept was sufficiently important that it resulted in a constitutional amendment forbidding the government from establishing religion or interfering with the free exercise of religion.

This case is currently before the Court on defendants' motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). The purpose of such a motion is to challenge the sufficiency of the complaint's factual assertions to state a legal claim for relief. Accordingly, for purposes of deciding the motion, the Court is required to assume that the factual allegations of the complaint are true. *Banner Industries v. Central States Pension Fund,* 875 F.2d 1285, 1287 (7th Cir.1989). Defendants argue that the Boy Scouts is beyond the scope of Title II, which applies only to places of public accommodations, and alternatively that application of Title II to the Boy Scouts would be unconstitutional. For the reasons described below, defendants' arguments are not sufficient to warrant dismissal at this preliminary stage of the proceedings, and their motion must therefore be denied.

The Court notes that defendants do not argue that lack of belief in God is a viewpoint which is not protected against religious discrimination. *See EEOC v. Townley Engineering & Mfg. Co.,* 859 F.2d 610, 614 n. 5 (9th Cir.1988), cert. denied, --- U.S. ----, 109 S.Ct. 1527, 103 L.Ed.2d 832 (1989); *Young v. Southwestern Savings and Loan Ass'n,* 509 F.2d 140 (5th Cir.1975).[2] Thus the issue in this case is not whether individuals who do not believe in God are entitled to be treated under anti-discrimination laws the same as individuals who hold any other beliefs concerning religion, but rather whether the Boy Scouts is an organization which is entitled to discriminate among membership applicants on the basis of religion.

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[2] *Cf. Wallace v. Jaffree,* 472 U.S. 38, 52-54, 105 S.Ct. 2479, 2487-88, 86 L.Ed.2d 29 (1985): "[T]he individual's freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority. At one time it was thought that this right merely proscribed the preference of one Christian sect over another, but would not require equal respect for the conscience of the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism. But when the underlying principle has been examined in the crucible of litigation, the Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all. This conclusion derives support not only from the interest in respecting the individual's freedom of conscience, but also from the conviction that religious beliefs worthy of respect are the product of free and voluntary choice by the faithful, and from recognition of the fact that the political interest in forestalling intolerance extends beyond intolerance among Christian sects-- or even intolerance among 'religions'--to encompass intolerance of the disbeliever and the uncertain."

II. FACTS

Plaintiff Mark Welsh is the seven-year-old child of plaintiff Elliott Welsh and Donna Arsenoff. He lives with his parents in Hinsdale, Illinois, where he attends first grade. Neither plaintiff is a member of any organized religion, nor does either of them "firmly believe in a Supreme Being (God)." (Complaint P 3(b).)[3]

Defendant Boy Scouts of America ("BSA") is a voluntary, charitable membership organization chartered by Congress in 1916 pursuant to 36 U.S.C. §§ 21-29. The purposes of the organization, as stated by Congress, are:

> to promote, through organization, and cooperation with other agencies, the ability of boys to do things for themselves and others, to train them in scoutcraft, and to teach them patriotism, courage, self-reliance, and kindred virtues, using the methods which were in common use by Boy Scouts on June 15, 1916.

36 U.S.C. § 23.

BSA is a civic organization which promotes, *inter alia*, good citizenship, physical fitness and camping for boys seven years of age and older. It encourages or requires adult family members of minor applicants to join BSA as supervisors. On plaintiffs' information and belief, BSA has over 4,000,000 members nationwide. Defendant West Suburban Council Boy Scouts of America ("Council")[4] is a local chapter of BSA located in LaGrange, Illinois. (BSA and the Council shall be referred to collectively as the "Boy Scouts.")

The Tiger Cubs is a BSA program for boys who are seven years old or in the first grade. On or about September 11, 1989, at Anne Jeans

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[3] Defendants refer to plaintiffs as atheists, but that label does not appear in plaintiffs' complaint and may not be accurate. An "atheist" is "one who denies the existence of God," while an "agnostic" is "one who holds the view that any ultimate reality (as God) is unknown and probably unknowable." Webster's Ninth New Collegiate Dictionary (1983). See also 1 Encyclopedia of Philosophy (ed. P. Edwards, 1967) at 56 ("agnosticism is the view that we do not know whether there is a God or not"); id. at 175 (an "atheist ... maintains that there is no God ... [or] rejects belief in God"). Plaintiffs' complaint does not specifically characterize plaintiffs as adherents to either of these positions.

[4] The Council is sued under the name "Boy Scouts of America, West Suburban Council # 147." Defendants represent that the organization's correct name is that set forth in the text.

Grade School, Mark Welsh was supplied with a flyer inviting students to join BSA Tiger Cub Scout Pack 56. The flyer stated that a recruitment meeting for the Tiger Cubs would take place on September 15, 1989 at the Palisades School in Burr Ridge, Illinois.[5]

Mark Welsh attended the September 15 meeting along with Elliott Welsh, intending to enroll in the Tiger Cubs. At the meeting, Elliott Welsh was given an application to fill out for himself and his son.[6] At that time, plaintiffs learned that application to join BSA requires the applicant to "recognize an obligation to God" and to take an oath to do one's "duty to God." Elliott Welsh discussed these requirements with the scout leader in attendance, Tom Bannon, who informed him that an applicant would have to agree with the statements regarding God or be barred from participating in BSA.

Plaintiffs left the meeting without applying, but Elliott Welsh subsequently sent a completed application and fees to the Council. On the application, he noted that he could not subscribe to BSA's Declaration of Religious Principle and the other references to God. The application was returned to him on September 28, 1989, along with a letter from BSA official Richard Corwin, who explained that the application could not be accepted unless the applicants agreed with the Declaration of Religious Principle set forth on the application.

On October 7, 1989, Elliott Welsh wrote a letter to BSA headquarters in Irving, Texas, reaffirming his and his son's desire to join BSA and suggesting that BSA should not exclude applicants based on religion. On October 30, 1989, plaintiffs received a reply from Harold Sokolsky, Assistant to the Chief Scout Executive, stating that in order to participate in BSA, adult leaders must sign the Declaration of Religious Principle and youth members are required to acknowledge a duty to God.[7]

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[5]The flyer is reproduced as Appendix A.

[6]Portions of the application form are reproduced as Appendix B.

[7]The letter stated in part:

> Our membership requirements which were established at our inception in 1910 have been in effect since then, and we are determined to maintain our position. Adult leaders are required to sign our declaration of religious principle, and youth members must subscribe to the Cub Scout Promise or Boy Scout Oath which includes "duty to God." While not intending to define what constitutes belief in God, we do reaffirm our religious principle. You have a valid point that we do not explain this qualification in our recruiting material and we are now studying ways to inform potential members of this fact.

BSA has also issued a "Reaffirmation of the Position of the Boy Scouts of America on 'Duty to God' " ("Reaffirmation") which emphasizes the importance of belief in God to the Boy Scouts.[8] There is no indication in the record of the circumstances which surrounded publication of the Reaffirmation.

Plaintiffs brought this lawsuit on March 21, 1990, alleging that the exclusion from BSA of individuals who are unwilling to subscribe to BSA's religious principles violates Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a *et seq.* As relief, plaintiffs seek an injunction prohibiting BSA from maintaining a policy of refusing to admit persons who do not believe in God and requiring the Council to admit Mark Welsh as a youth member and Elliott Welsh as an adult partner. Defendants have moved to dismiss the complaint, arguing that even assuming the facts alleged by plaintiffs, the Court must find that Title II does not apply to the Boy Scouts and, alternatively, that it would be unconstitutional to apply Title II to the Boy Scouts. The Court cannot accept either of these arguments without giving plaintiffs an opportunity to gather and present factual evidence.

III. SCOPE OF TITLE II

A. Place of Public Accommodation

42 U.S.C. § 2000a(a), the centerpiece of Title II of the Civil Rights Act of 1964, provides:

> (a) All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

Defendants argue that the Boy Scouts is not a "place of public accommodation," and that the Boy Scouts is therefore not subject to the restrictions of Title II. The statute defines "place of public accommodation" as follows:

> Each of the following establishments which serves the public

[8]The Reaffirmation, which is included as an exhibit to the complaint, is reproduced as Appendix C.

> is a place of public accommodation within the meaning of this subchapter if its operations affect commerce, or if discrimination or segregation by it is supported by State action:
>
> (1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;
>
> (2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;
>
> (3) any motion picture house, theater, concert hall, sports arena, stadium or other *place of* exhibition or *entertainment*; and
>
> (4) any establishment (A)(i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment.

42 U.S.C. § 2000a(b) (emphasis added). Plaintiffs contend that the Boy Scouts is a "place of public accommodation" by virtue of § 2000a(b)(3) because it is a "place of entertainment." Defendants argue that the Boy Scouts is not a "place," is not an "accommodation," and does not provide "entertainment." Defendants also argue that Congress specifically excluded the Boy Scouts from the reach of Title II.

1. "Place"

[1] Initially, the Court addresses defendants' argument that the Boy Scouts cannot be a place of public accommodation because it is not a "place" but rather is a membership organization. Place, according to defendants, refers to a "physical facility." Boy Scout groups, on the other hand, can meet in a variety of places, and the groups are defined by membership rather than by a particular facility.

In support of this argument, defendants point out that the specific types of facilities identified in Title II all are centered around definite physical places of business. Defendants also rely on several cases which have found that state statutes which prohibit discrimination by a "place of public accommodation" do not apply to organizations which do not conduct business from a specific physical "place." *See United States Jaycees v. Massachusetts Commission Against Discrimination ("MCAD")*, 391 Mass. 594, 463 N.E.2d 1151 (1984); United States Jaycees v. Richardet, 666 P.2d 1008 (Alaska 1983); *United States Jaycees v. Bloomfield*, 434 A.2d 1379 (D.C.Ct.App.1981).[9]

Plaintiffs respond by emphasizing that Title II must be read broadly so as to effectuate its purpose of removing "the daily affront and humiliation involved in discriminatory denials of access to facilities ostensibly open to the general public." *Daniel v. Paul*, 395 U.S. 298, 307-08, 89 S.Ct. 1697, 1702, 23 L.Ed.2d 318 (1969).[10] Plaintiffs also cite cases which have interpreted state public accommodation statutes broadly to apply beyond specific physical facilities. *See United States Jaycees v. McClure*, 305 N.W.2d 764 (Minn.1981); *National Organization for Women v. Little League Baseball, Inc.*, 127 N.J.Super. 522, 318 A.2d 33 (1974), *aff'd mem.*, 67 N.J. 320, 338 A.2d 198 (1974).[11]

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[9]Defendants also cite *Schwenk v. Boy Scouts of America*, 275 Or. 327, 551 P.2d 465 (1976), which held that BSA was not a place of public accommodation under Oregon state law. However, the opinion in Schwenk did not focus on BSA's lack of a specific physical facility.

[10]*See also Miller v. Amusement Enterprises, Inc.*, 394 F.2d 342, 349 (5th Cir.1968): "We do not read [Title II] with narrowed eye but with open minds attuned to the clear and strong purpose of the Act, namely, to secure for all citizens the full enjoyment of facilities described in the Act which are open to the general public. That Title II of the Civil Rights Act is to be liberally construed and broadly read we find to be well established."

[11]The state court cases cited by defendants all focus on specific textual considerations, and they all interpret state statutes which define "place of public accommodation" by reiterating the word "place." *See MCAD*, 463 N.E.2d at 1152 n. 1 (statute defines "place of public accommodation" as "includ[ing] any place, whether licensed or unlicensed, which is open to and accepts or solicits the patronage of the general public ..."); *Richardet*, 666 P.2d at 1009 n. 2 (statute defines "place of public accommodation" as "a place which caters or offers its services, goods or facilities to the general public ..."); *Bloomfield*, 434 A.2d at 1381 (statute defines "place of public accommodation" as "all places included in the meaning of such terms as ... hotels ... restaurants ... barrooms," etc.). In contrast, the statutes in the state cases cited by plaintiffs, as well as Title II, do not reiterate the word "place" when defining "place of public accommodation" but rather use arguably broader words such as "establishment" or "facility." ("Establishment" may refer not

All of these state court cases interpret state public accommodations statutes rather than Title II. However, the Court finds the reasoning in the cases cited by plaintiffs to be persuasive. The word "place" in the phrase "place of public accommodation," as used in the federal and state statutes, is most naturally read to be intended not as restrictive but rather as a convenient term to apply to organizations which sell or provide goods or services to the public. As stated in *Little League*, "[t]he statutory noun 'place' (of public accommodation) is a term of convenience, not limitation. It is employed to reflect the fact that public accommodations are commonly provided at fixed 'places,' e.g., hotels, restaurants, swimming pools, etc." 318 A.2d at 37.[12]

As the *Little League* court observed, an accommodation can have a moving situs and still be considered a "place," as exemplified by a train. 318 A.2d at 37. Even membership organizations provide their goods or services at "places," although those places may be mobile or shifting. Thus the Little League Baseball organization has a "place" which "is obviously the ball field at which tryouts are arranged, instructions given, practices held and games played." *Id.* In the case of a more amorphous organization like the Jaycees, the "facility" is not

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only to a "place of business or residence," but also, for example, to "a permanent civil or military organization," according to Webster's Ninth New Collegiate Dictionary (1983).) See 42 U.S.C. § 2000a(b) ("Each of the following establishments which serves the public is a place of public accommodation ..."); *McClure*, 305 N.W.2d at 766 (statute defines "place of public accommodation" as "a business ... facility of any kind ... whose goods ... [and] privileges ... are sold, or otherwise made available to the public"). *Cf. Little League, supra* (New Jersey statute, N.J.S.A. 10:1-5, does not use the term "place," but merely defines by example). *But see United States Jaycees v. Iowa Civil Rights Comm'n*, 427 N.W.2d 450 (Iowa 1988) (while conceding that majority of decisions are to contrary, holds that Jaycees are not place of public accommodation under Iowa statute which applies to "place[s]," "establishment[s]," and "facilit[ies]").

[12]*Little League* was cited with apparent approval when the United States Supreme Court determined that application of Minnesota's public accommodations statute to the Jaycees (*see McClure, supra*) would not infringe upon members' rights of association. *Roberts v. United States Jaycees*, 468 U.S. 609, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984). The Supreme Court stated: "In deciding that the Act reaches the Jaycees, the Minnesota Supreme Court used a number of specific and objective criteria--regarding the organization's size, selectivity, commercial nature, and use of public facilities--typically employed in determining the applicability of state and federal antidiscrimination statutes to the membership policies of allegedly private clubs. *See, e.g., Nesmith v. Young Men's Christian Ass'n*, 397 F.2d 96 (4th Cir.1968); *National Organization for Women v. Little League Baseball, Inc.*, 127 N.J.Super. 522, 318 A.2d 33, aff'd mem., 67 N.J. 320, 338 A.2d 198 (1974)."

only the headquarters but also "the sometimes door-to-door, company-to-company solicitation of members for the organization, and ... the oft-shifted sites at which the affiliated local chapters hold their meetings during part of which a sales approach is usually made to prospective members invited to the meeting for that purpose." *McClure*, 305 N.W.2d at 772. As the McClure court further noted, "A variety of enterprises that serve the public do not extend their goods and privileges from the same physical location (*e.g.*, electricians, locksmiths, learning-at-home courses), and often they do not own or lease the sites at which they offer their goods and privileges." *Id.*[13]

For this reason, it simply would not make sense to interpret Title II as applying only to a physical facility rather than to a business or organization, which of necessity inhabits physical facilities, whether they be fixed and unitary or shifting and multiple.[14] Defendants assert that "A Tiger Club [sic: Cub] group meets where it will: a church basement, a private house, or a backyard may be a Tiger Cub group meeting on a transitory basis." (Mem. in Support at 11.) Defendants do not argue that a church basement, a house, or a backyard is not a "place." Furthermore, it would be impossible in practice to draw a distinction between "places," which defendants argue are covered by Title II, and "membership organizations," which defendants argue are not covered by Title II. Many establishments are membership organizations which center their activities around certain definable places. When exclusionary practices of such organizations have been challenged pursuant to Title II, courts generally have focused more on the membership practices of the organizations (in particular, the selectivity of the membership process) than on the characteristics of the physical facilities involved (such as openness to the public).

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[13] *Cf. Little League*, 318 A.2d at 38 ("we discern nothing in the statute or its underlying purposes to persuade us that what would otherwise be a place of public accommodation is any less so ... because it does not have exclusive use or possession of the site of its operations").

[14] Further guidance may be found in California court decisions interpreting the Unruh Civil Rights Act, California's public accommodations statute. The Unruh Act originally applied to "places of public accommodation and recreation" and was later amended to apply to "all business establishments of every kind whatsoever." *See generally Isbister v. Boys' Club of Santa Cruz, Inc.*, 40 Cal.3d 72, 219 Cal.Rptr. 150, 153, 707 P.2d 212, 215 (1985). In *Curran v. Mount Diablo Council of the Boy Scouts of America*, 147 Cal.App.3d 712, 195 Cal.Rptr. 325 (1983),

See, e.g., Durham v. Red Lake Fishing and Hunting Club, Inc., 666 F.Supp. 954 (W.D.Tex.1987); *People of State of New York v. Ocean Club, Inc.*, 602 F.Supp. 489 (E.D.N.Y.1984); *United States v. Slidell Youth Football Association*, 387 F.Supp. 474 (E.D.La.1974). In other words, the issue is generally framed in terms of the extent of public access to membership in the organization rather than the access of the public, as consumers, to the establishment's physical facilities.

Thus the distinction advocated by defendants would be arbitrary, unworkable in practice, and contrary to the statute's remedial purposes.[15] The Court finds no basis for excluding from Title II's reach organizations which do not operate a unitary, definite "place" of business but rather carry out their activities in a large number of temporary locations.

Accordingly, the Court rejects defendants' argument that the Boy Scouts cannot, as a matter of law, be subject to the provisions of Title II because it is not a "place."

2. "Accommodation"

[2] In order for an establishment to constitute a "place of public accommodation," it must fit within one of the categories described in 42 U.S.C. § 2000a(b). *See supra* at 1419. Plaintiffs contend that the Boy Scouts is a "place of entertainment" and thus fits within § 2000a(b)(3).

Defendants dispute this characterization, arguing that the function of the Boy Scouts is education rather than entertainment. Plaintiffs

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appeal dismissed, 468 U.S. 1205, 104 S.Ct. 3574, 82 L.Ed.2d 873 (1984), the court held that "business establishments" included the Boy Scouts, rejecting the argument that the statute applied only to commercial enterprises. See also *Isbister*, 219 Cal.Rptr. at 155, 707 P.2d at 217 (finding that Boys' Club--a membership organization which centered around a physical facility--was a "place of public accommodation or amusement" and thus a "business establishment).

Also instructive is the opinion in *Kiwanis International v. Ridgewood Kiwanis Club*, 806 F.2d 468 (3d Cir.1986), *cert. dismissed*, 483 U.S. 1050, 108 S.Ct. 362, 97 L.Ed.2d 812 (1987). Although the Third Circuit found that the service organization at issue was not a "place of public accommodation" under New Jersey law, it emphasized that it did not focus on "the spatial characteristics of 'place' " but rather on the extent to which the organization was open to the public. 806 F.2d at 474-75.

[15]Furthermore, as discussed below (*see infra* at 1424-1425), Title II includes an exemption for "private clubs." Such an exemption would be meaningless if Title II did not apply to any membership organizations, or clubs, in the first place.

respond by emphasizing the language in the Boy Scouts flyers, which seek to attract new members by emphasizing that members "have fun." (*See* Appendix A.) Plaintiffs also point out that "places of entertainment" for purposes of Title II include establishments which provide participatory recreational activities as well as those which provide passive entertainment. *See Daniel, supra,* 395 U.S. at 306-08, 89 S.Ct. at 1701-02; *Miller v. Amusement Enterprises, Inc.,* 394 F.2d 342, 350-51 (5th Cir.1968); *Brown v. Loudoun Golf & Country Club, Inc.,* 573 F.Supp. 399, 402 (E.D.Va.1983); *Slidell, supra,* 387 F.Supp. at 482.

In light of the Boy Scouts' own emphasis on recreational activities and having "fun," as emphasized in the Boy Scouts literature attached to the complaint, the Court cannot conclude as a matter of law that the Boy Scouts is not a "place of entertainment."

[3] Defendants further argue that the Boy Scouts is not a "place of public accommodation" because a "role in a membership organization" is not an "accommodation." Defendants rely on Webster's Third New International Dictionary, which defines "accommodation" as "lodging, food, and services (as at a hotel) or seat, berth, or other space occupied together with services available (as on a train)...."

For reasons beyond the principle that "one of the surest indexes of a mature and developed jurisprudence [is] not to make a fortress out of the dictionary," *Cabell v. Markham,* 148 F.2d 737, 739 (2d Cir.) (L. Hand, J.), *aff'd,* 326 U.S. 404, 66 S.Ct. 193, 90 L.Ed. 165 (1945), the Court finds that a role in a membership organization does constitute an "accommodation" for purposes of Title II. Even under the definition proffered by defendants, "accommodation" encompasses the provision of services, and roles in a membership organization provide members with certain privileges and services in exchange for the members' contributions of time, money or other support. To exclude membership organizations from Title II would leave open a facile and obvious method for an otherwise covered establishment to continue discrimination in avoidance of Title II's strictures--the establishment would need only to reconstitute itself as a membership organization and grant memberships only to members of a certain race, sex, creed, etc. Indeed, many establishments attempted to evade Title II through

this very means, but the resulting case law makes it clear that Title II does apply to membership organizations. *See, e.g., Daniel, supra,* 395 U.S. at 302-08, 89 S.Ct. at 1699-1702 (recreational facility which instituted membership feature following passage of Civil Rights Act of 1964 was place of public accommodation); *Slidell Youth, supra,* 387 F.Supp. at 482-83 (athletic association which in 1972 dropped white-only requirement and instituted restrictive membership clause was place of public accommodation). *Cf. United States v. Lansdowne Swim Club,* 894 F.2d 83 (3d Cir.1990) (athletic membership club was place of public accommodation); *Durham, supra,* 666 F.Supp. at 959-60 (recreational membership club was place of public accommodation); *Ocean Club, supra,* 602 F.Supp. at 494-96 (membership club was place of public accommodation); *Brown, supra,* 573 F.Supp. 399 (E.D.Va.1983) (golf membership club was place of public accommodation).[16]

[4] Defendants further argue that at least certain roles in the Boy Scouts, such as Cubmaster and Scoutmaster, are not open generally to the public but rather are open only to individuals who are good role models. Therefore, defendants contend, these specific roles cannot be "accommodations," and in turn no roles in the Boy Scouts can be "accommodations." This argument suffers from at least two flaws. First, the question of whether a service is open to the general public does not affect whether it is an "accommodation," but rather affects whether it is a "place of public accommodation" and whether it is a "private club" (*see infra* at 1424-1428). Second, the fact that some aspects of an organization may not be open to the general public does not remove the entire organization from the scope of Title II.

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[16]Defendants also rely on *Schwenk v. Boy Scouts of America,* 275 Or. 327, 551 P.2d 465 (1976), which held that the Boy Scouts was not a place of public accommodation for purposes of the Oregon public accommodations statute. The Oregon statute in question, however, is narrower than Title II; its primary purpose is to prohibit discrimination only by "business and commercial enterprises." 551 P.2d at 468. It would not, for example, apply to the YMCA. *Id.* 551 P.2d at 469. Title II, in contrast, applies beyond businesses, and includes organizations like the YMCA. *See, e.g., Smith v. Young Men's Christian Ass'n,* 462 F.2d 634 (5th Cir.1972); *Stout v. Young Men's Christian Ass'n,* 404 F.2d 687 (5th Cir.1968); *Nesmith v. Young Men's Christian Ass'n,* 397 F.2d 96 (4th Cir.1968). Therefore, case law developed under the Oregon statute cannot be relied upon with respect to Title II.

In fact, the converse is true: if part of an establishment is covered by Title II, the entire establishment is subject to its provisions. *See Daniel, supra,* 395 U.S. at 305, 89 S.Ct. at 1701; *Lansdowne, supra,* 894 F.2d at 87.

The Court finds that defendants have not established, as a matter of law, that the Boy Scouts is not an "accommodation" for purposes of Title II.

3. Congressional Intent

[5] Defendants also argue that Congress intended to exempt the Boy Scouts from the coverage of Title II. Central to this argument is the language of the 1916 act which chartered the Boy Scouts. That statute provided that a purpose of the Boy Scouts was to train boys "using the methods which were in common use by Boy Scouts on June 15, 1916." 36 U.S.C. § 23. Because the Boy Scouts had stated as early as 1911 that "no boy can grow into the best kind of citizenship without recognizing his obligation to God" (*see* Appendix C), defendants argue that Congress gave its stamp of approval to the Boy Scouts' exclusion of individuals who could not subscribe to its religious principles. To now interpret Title II as requiring the Boy Scouts to surrender this policy would, defendants maintain, be a finding that Title II implicitly repealed that portion of the 1916 charter which endorsed the methods practiced by the boy Scouts in 1916. Because implicit repeals are not favored, Title II should not be interpreted in this manner.

In support of this argument, defendants rely on Morton v. Mancari, 417 U.S. 535, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974). In Morton, the Supreme Court found that the anti-discrimination provisions of the Equal Employment Act of 1972, 42 U.S.C. § 2000e *et seq.*, did not override an employment preference created by the Indian Reorganization Act of 1934, 25 U.S.C. § 472, for Native Americans in the Bureau of Indian Affairs. The Court stated that "repeals by implication are not favored" and noted that the employment prefe ence was "a specific provision applying to a very specific situation." 417 U.S. at 549-50, 94 S.Ct. at 2482-83. Accordingly, absent a clear intent to the contrary, the employment preference was not nullified by the more general anti-discrimination statute. 417 U.S. at 551, 94 S.Ct. at 2483.

The argument that Congress sanctioned the Boy Scouts' discriminatory policy is too attenuated to permit the extension of *Morton* to this case. The 1916 charter is not "a specific provision applying to a very specific situation" with respect to the Boy Scouts' exclusion of individuals who did not believe in God. There is no indication that in recognizing the purposes of the Boy Scouts as including the use of methods which were in use in 1916, Congress intended to adopt, or was even aware of, the Boy Scouts' policy concerning religion.[17] Congress was not creating a new organization; it was merely providing official recognition to an existing organization. As the *Little League* court noted in an analogous context:

> [T]he purpose clause of the Little League charter does not signify a congressional policy decision that only boys should play baseball. The statute rather represents only a determination that Little League Baseball, Inc., such as it is, should have a national charter.... Moreover, the ascription of any purpose or policy beyond the mere grant of a federal charter would be incompatible with Congress' limited power to create corporations.

318 A.2d at 40.[18] Indeed, in light of the establishment clause of the First Amendment, it is questionable whether Congress would have the power to charter an organization officially entitled to discriminate on the basis of religion. Furthermore, without any indication in the language of the 1916 statute that Congress intended to permit the Boy Scouts to discriminate on the basis of religion, it is extremely unlikely

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[17]As plaintiffs point out, although the 1911 *Handbook* emphasized the importance of recognizing an obligation to God as a prerequisite to good citizenship, there is no clear indication in the record that the 1911 *Handbook* provided for the exclusion from the Boy Scouts of individuals who did not profess a belief in God. Furthermore, even if such a membership policy existed--and was known by Congress--the vague language of the 1916 charter does not clearly demonstrate that an objective of Congress was to perpetuate this policy. *Cf. Little League*, *supra*, 318 A.2d at 39-40 (the Little League charter and its statutory history "do show that Congress *contemplated* participation only by boys; however, they do not show that a limitation exclusively to boys was an avowed congressional objective").

[18]The *Little League* court also expressed a belief that "the charter is itself a tenuous exercise of federal power." 318 A.2d at 40 n. 4. The parties in this case have not discussed whether the Boy Scouts charter was a legitimate exercise of federal power, and that issue need not be resolved to decide the pending motion.

that Congress, in subsequently enacting Title II, would have been conscious of the alleged statutory authorization for the Boy Scouts' policy and thus would have considered whether to override it.

The Boy Scouts unsuccessfully made a similar argument in *Curran, supra,* in which the court found that California's Unruh Act prohibited the Boy Scouts from excluding homosexual men. The Court held that the language of the charter did not sanction such discrimination and emphasized that in granting the charter Congress gave the Boy Scouts the power to "make and adopt by-laws, rules and regulations not inconsistent with the laws of the United States, or any State thereof...." 195 Cal.Rptr. at 339, citing 36 U.S.C. s 22. Similarly, in *Little League,* the court stated: "The New Jersey statute as applied does not vitiate the charter of incorporation; it merely regulates how Little League shall conduct its activities in the State of New Jersey in respect to exclusion of participants on the basis of sex. In this regard it may be noted that the charter's objects are required to be pursued 'in all lawful ways.' " 318 A.2d at 41.

The Court concludes that the 1916 charter does not provide statutory authorization for the Boy Scouts to discriminate on the basis of religious belief, and that even assuming such an authorization can be inferred, it does not survive the enactment of Title II.[19]

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[19]Defendants also rely on certain cases in which public accommodation statutes have not been applied to organizations with religion-based membership criteria. However, those cases did not hold that *all* organizations may exclude individuals on the basis of their religious beliefs; such a holding would conflict with Title II's express inclusion of "religion" as an impermissible basis for discrimination. Rather, they relied on factual evidence concerning such factors as the selectivity of the organizations to find that the organizations were not places of public accommodation. Thus in *Kiwanis,* the local organization had added as a membership requirement that a candidate be willing to pray and recite the pledge of allegiance. 806 F.2d at 475. The Court did not emphasize this requirement in holding that the organization was not a place of public accommodation, but rather stressed that the organization's membership criteria and practices as a whole did not pass the test of "unselectivity, unrestrictedness, and open invitation." 806 F.2d at 476. *See also Cornelius v. Benevolent Protective Order of Elks,* 382 F.Supp. 1182, 1203 (D.Conn.1974) (Elks organization was private club); *Kiwanis Club of Great Neck, Inc. v. Board of Trustees of Kiwanis,* 41 N.Y.2d 1034, 363 N.E.2d 1378, 395 N.Y.S.2d 633 (1977), cert. denied, 434 U.S. 859, 98 S.Ct. 183, 54 L.Ed.2d 132 (1977). These cases involved organizations with more stringent membership criteria than those which appear, from the current record, to apply to the Boy Scouts.

B. Private Club

Title II explicitly excludes "private clubs" from coverage as places of public accommodation:

> The provisions of this subchapter shall not apply to a private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment within the scope of subsection (b) of this section.

42 U.S.C. § 2000a(e). Defendants argue that the Boy Scouts is a private club and is thus exempt from the provisions of Title II.[20]

[6] In determining whether an organization is a private club for purposes of Title II, courts have weighed a number of factors. In *United States v. Lansdowne Swim Club*, 713 F.Supp. 785 (E.D.Pa.1989), *aff'd*, 894 F.2d 83 (3d Cir.1990), the court reviewed the case law and summarized the relevant factors as follows:

1. The genuine selectivity of the group in the admission of its members.
2. The membership's control over the operations of the establishment.
3. The history of the organization.
4. The use of the facilities by nonmembers.
5. The purpose of the club's existence.
6. Whether the club advertises for members.
7. Whether the club is profit or non-profit.
8. The formalities observed by the club, e.g., bylaws, meetings, membership cards.

713 F.Supp. at 796-97, citing *Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431, 438, 93 S.Ct. 1090, 1094, 35 L.Ed.2d 403 (1973); *Wright v. Salisbury Club, Ltd.*, 632 F.2d 309, 312-13 (4th Cir.1980); *Nesmith v. YMCA*, 397 F.2d 96, 102 (4th Cir.1968); *Durham v. Red Lake Fishing & Hunting Club*, 666 F.Supp. 954, 960 (W.D.Tex.1987);

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[20]Defendants argue that the Boy Scouts are excluded from Title II by an "express exemption." (Mem. in Support at 9.) In support of this argument, defendants refer only to the "private club" exclusion, the application of which concerns questions of fact. This hardly constitutes an "express exemption."

Brown v. Loudoun Golf & Country Club, Inc., 573 F.Supp. 399, 402-03 (E.D.Va.1983); *United States v. Trustees of Fraternal Order of Eagles*, 472 F.Supp. 1174, 1175-76 (E.D.Wis.1979); *Cornelius v. Benevolent Protective Order of Elks*, 382 F.Supp. 1182, 1203 (D.Conn.1974); *Wright v. Cork Club*, 315 F.Supp. 1143, 1152 (S.D.Tex.1970); *United States v. Jordan*, 302 F.Supp. 370, 375-76 (E.D.La.1969). The most significant of these factors--as evidenced by the language of the statute itself and by the importance given to it in the case law--is the selectivity of the organization in admitting new members. See Brown, 573 F.Supp. at 403; Fraternal Order of Eagles, 472 F.Supp. at 1175.

[7] The burden is on defendants to prove that the Boy Scouts is a private club. *Lansdowne*, 894 F.2d at 85. As is evident from the types of factors that are relevant to the analysis, determining whether an organization is a private club generally requires a detailed factual analysis of the organization's structure and policies. Thus to prevail on their motion to dismiss, defendants have the difficult task of showing that under no set of facts consistent with the allegations of the complaint could the Boy Scouts be found to be other than a private club. In the instant case, defendants have not succeeded at this task.

[8][9] With respect to selectivity of membership, plaintiffs allege that the Boy Scouts is open to all members of the public who subscribe to the Boy Scouts' religious principles. Plaintiffs emphasize that the literature distributed by the Boy Scouts appears to extend an open invitation to all boys and their adult relatives. One flyer states, for example, "You can join Tiger Cubs, BSA if you are in the first grade." (*See* Appendix A.) The flyer further states:

Q. Who can be a Tiger Cub?

A. Any boy who is in the first grade (or is 7 years old) may join Tiger Cubs, BSA, with his adult partner.

Q. Who can be an adult partner?

A. Any adult 18 years of age or older can work with the boy in Tiger Cubs, BSA. This can be mom, dad, an aunt, uncle or grandparent, an older brother or sister, or even a neighbor.

(*See* Appendix A.)

The Court also notes that there is no evidence in the record of any standards--other than the Declaration of Religious Principle--that the Boy Scouts use to screen membership applications. The lack of such standards is a significant factor weighing against a finding that an organization is a private club. *See, e.g., Lansdowne,* 894 F.2d at 86 (organization was not public accommodation where it had no substantial membership standards, even though applicants were subject to approval by vote of existing members). Furthermore, there is no indication in the record that the Boy Scouts has ever refused membership to an individual who was willing to subscribe to the Declaration of Religious Principle. *Cf. Wright,* 632 F.2d at 312 (club which had only turned down three white applicants for membership was not selective and was not private club); *Durham,* 666 F.Supp. at 960 (club which had only turned down two white applicants for membership was not selective and was not private club). The degree of selectivity exercised by the Boy Scouts is comparable to that of the organization at issue in *Slidell, supra:*

> Over 2,000 applications by whites have been made since 1969 and all of them have been accepted. No interview is conducted, no recommendation is required, no evaluation of the youth is made, no discussion of the benefits the youth offers to SYFA occurs. In short, an application from a white youth is automatically accepted if he tenders the requisite fee, a waiver of liability signed by his parents, and is of a certain age and weight. These criteria reflect a total lack of genuine selectivity.

387 F.Supp. at 485. Similarly, there is no allegation here that the Boy Scouts conducts an interview, requires a recommendation, or evaluates the benefits a youth will offer before accepting the application of a youth who professes a belief in God.

The fact that the Boy Scouts exercises some selectivity by requiring members to sign the Declaration of Religious Principle does not in itself show that the organization is a private club. This is illustrated by *Daniel, supra,* in which the Supreme Court found that a recreation club was not private even though it exercised some selectivity by excluding black persons from membership. 395 U.S. at 302, 89 S.Ct.

at 1699. The Court emphasized the district court's finding of fact that the club was "open in general to all of the public who are members of the white race." *Id. See also Tillman v. Wheaton-Haven Recreation Ass'n, Inc.*, 410 U.S. 431, 438, 93 S.Ct. 1090, 1094, 35 L.Ed.2d 403 (1973) (organization was not private club where it was "open to every white person within the geographic area, there being no selective element other than race"); *Durham, supra*, 666 F.Supp. at 959 ("a 'truly private club' ... does have the right to discriminate against potential members based on race; but clearly the *only* criteria for selection cannot be that one be white). Similarly, on the present record, it appears that the Boy Scouts is open to all boys who profess a belief in God.

Another instructive example is *Fraternal Order of Eagles, supra*, in which the defendants moved to dismiss a Title II lawsuit on the basis that the organization was a private club. The court noted that the organization had formal membership requirements which included the following:

> (1) "[e]very applicant for membership in any Local Aerie shall be recommended by two members of the Order"; (2) "[n]o person shall be eligible to be elected to membership in any Local Aerie unless such person is a male, *is of good moral character, and believes in the existence of a Supreme Being*, ..."; (3) "[n]o application for membership shall be considered if the applicant shall not reside within the jurisdiction of the Aerie to which such application is submitted"; (4) "[e]ach person desiring to become a member of an Aerie must properly fill out and sign an application ..."; (5) "[a]ll applications for membership ... shall be referred to the Investigating Committee"; and (6) "[a]fter the report of the Investigating Committee is submitted, the application shall be voted upon...."

472 F.Supp. at 1176 (emphasis added). The court found that despite these formal membership requirements, which are more stringent than those which appear from the present record in this case, the organization had not established that it was a private club as a matter of law. 472 F.Supp. at 1177. *See also Curran, supra*, 195 Cal.Rptr. at

336-37 (Boy Scouts not a private club exempt from California's Unruh Act). Thus exclusion of individuals on the basis of religion does not in itself make an organization a private club.

Furthermore, the requirement that members believe in God is scarcely a estrictive criterion. There are countless individual interpretations of what "God" is or what it means to "believe in God." *Cf.* H.P. Owen, "God, Concepts of," 3 Encyclopedia of Philosophy at 344 ("It is very difficult--perhaps impossible--to give a definition of God that will cover all usages of the word and of equivalent words in other languages."). The Boy Scouts chooses not to address this dilemma: "It is not the role of the Boy Scouts of America to give theological interpretations. Religion is the responsibility of the Scout's family and religious leaders." (Appendix C.) Based on the Boy Scouts' emphasis on its nonsectarian attitude (see also Declaration of Religious Principle, Appendix B), it apparently makes no difference to the Boy Scouts whether one believes that God is male, female, or neither; whether one believes that God consists of three entities or one; or whether one believes that God exists apart from the natural world or is synonymous with it. The Boy Scouts apparently believes, for instance, that Protestant members are willing to participate alongside of Catholics, Jews, Buddhists, Hindus, Unitarians, Deists, Hare Krishnas, and adherents to all religions known to humankind, but not atheists or agnostics. Indeed, the concept of "God" is sufficiently vagu that it is difficult to understand how the Boy Scouts can actually use, in practice, belief in God as a criterion for membership.[21]

Thus consideration of the most important factor in the private club analysis--selectivity of membership--does not, at this stage, support defendants' position that the Boy Scouts is a private club. Although

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[21]The requirement that applicants affirm their belief in God in order that they "can grow into the best kind of citizen (Declaration of Religious Principle, Appendix B) is similar to the requirement in *Brown, supra,* that an individual have "good moral character." 573 F.Supp. at 400. *Brown* involved further membership requirements which were more stringent than those of the Boy Scouts, including the payment of a $750.00 initiation fee, the signature of two members on the application form, and approval of the application by the board of directors. *Id.* There was also a ceiling of 450 members. *Id.* The court found that the organization's membership requirements were not selective, and that it was therefore not a private club. *Id.* at 403.

there is some meager evidence in the current record concerning the other relevant factors (*supra at 23*), the Court will not analyze those factors individually at this stage. Defendants do not argue that an application of those factors mandates a finding that the Boy Scouts is a private club, and in light of the factual nature of the inquiry and the literature quoted by plaintiffs such an argument would not have a realistic chance of succeeding in the context of a motion to dismiss. Rather, defendants emphasize the legislative history, which they maintain demonstrates that Congress intended to include the Boy Scouts in the concept of private club.

[10][11] In support of this argument, defendants cite a passage from the floor debate concerning Title V of the Civil Rights Act of 1964. Representative George Meader was asked whether an exemption for private clubs from Title V's provisions concerning the Civil Rights Commission's authority to collect and distribute information[22] would cover "such organizations as the Boy Scouts of America, the Girl Scouts, the Future Farmers of America, the 4-H Clubs--that type of organization." Representative Meader replied, "That would be covered by the term 'private club' like the Kiwanis Club, the Lions Club, and so forth." 110 Cong.Rec. 2296 (Feb. 6, 1964).[23] From Representative Meader's comment about Title V, defendants infer that Congress as a whole intended to include the Boy Scouts in the "private club" clause of Title II.

The Court cannot agree. Although statements of individual

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[22] See 42 U.S.C. § 1975c(b): "Nothing in this chapter or any other Act shall be construed as authorizing the Commission, its Advisory Committees, or any person under its supervision or control to inquire into or investigate any membership practices or internal operations of any fraternal organization, any college or university fraternity or sorority, any private club or any religious organization."

[23] In context, the passage reads as follows: Mr. [George] Grant.... Mr. Chairman, I want merely to ask the author of this substitute amendment to be sure that this does include fraternities and sororities, and that is exactly why this amendment is here today. Regardless of what the gentleman from Illinois said, the amendment offered by the gentleman from Louisiana did include fraternities and sororities, and that is why I supported it. This Commission has no more base for planting these young boys and girls on the campuses of these universities, public or private, in America, than they would have on a church which was situated on the campus of the university. So I would like to ask the gentleman from Michigan [Mr. Meader] if this does cover college fraternities and college sororities.

legislators may have some relevance to statutory interpretation, they are by no means controlling. *See Weinberger v. Rossi*, 456 U.S. 25, 35, 102 S.Ct. 1510, 1517, 71 L.Ed.2d 715 (1982); *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118, 100 S.Ct. 2051, 2061, 64 L.Ed.2d 766 (1980); *Chrysler Corp. v. Brown*, 441 U.S. 281, 311, 99 S.Ct. 1705, 1722, 60 L.Ed.2d 208 (1979); *United States v. O'Brien*, 391 U.S. 367, 383-85, 88 S.Ct. 1673, 1682-83, 20 L.Ed.2d 672 (1968). "What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it." *O'Brien*, 391 U.S. at 384, 88 S.Ct. at 1683. Here, the passage cited by defendants is simply too isolated and indirect to constitute an "express exemption" for the Boy Scouts from Title II's requirements. Particularly in light of the fact that the factors identified by the Title II precedents appear at this stage of the case to exclude, rather than include, the Boy Scouts from the private club exemption, the Court is unwilling to rely on Representative Meader's remark to hold that the Boy Scouts is exempt from Title II as a matter of law.

C. Conclusion

If the Boy Scouts were not a place of public accommodation, or if it were a private club, Title II would not only not prevent the Boy Scouts from excluding individuals who do not believe in God, it would also not prevent the Boy Scouts from engaging in other forms of discrimination as well. For instance, the Boy Scouts could exclude members of a racial minority or members of a particular sect of Christianity. Under such circumstances, the case would essentially be unchanged. If the visceral reaction would be different, it would serve

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Mr. Meader. Of course it does, but if the gentleman wants to pin that down, why not ask unanimous consent that that amendment be rereported, and everybody will hear it.

Mr. Grant. I understand it does. I certainly take the gentleman's word for it.

Mr. [John] Williams. Mr. Chairman, will the gentleman yield?

Mr. Grant. I yield to the gentleman from Mississippi.

Mr. Williams. I think it also might be well to inquire of the gentleman from Michigan if under the language of his amendment the Commission is prohibited from meddling in the affairs of such organizations as the Boy Scouts of America, the Girl Scouts, the Future Farmers of America, the 4-H Clubs--that type of organization.

Mr. Meader. That would be covered under the term "private club," like the Kiwanis Club, the Lions Club, and so forth.

only to demonstrate the persistence and depth of discrimination against atheists. *See infra* at 1433-1434. To argue that Title II does not prohibit the Boy Scouts from discriminating against atheists is to argue that Title II does not prohibit any type of discrimination by the Boy Scouts. As the Court has described above, defendants have not shown that the Boy Scouts are not subject to Title II. Further, if there is a principle which specifically allows the Boy Scouts to discriminate against individuals who do not believe in God, it must be that individuals who believe in God should not be required to associate with individuals who do not. That issue concerns not the scope of Title II, but the scope of the First Amendment. It is to the constitutional issues which are thus raised that the Court now turns.

IV. FREEDOM OF ASSOCIATION AND FREE EXERCISE

Defendants argue that application of Title II to the Boy Scouts would infringe on members' freedom to associate, which is guaranteed by the First Amendment to the United States Constitution.[24] There are two types of freedom of association which have been afforded constitutional protection-- freedom of intimate association and freedom of expressive association. *See Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 107 S.Ct. 1940, 1945, 95 L.Ed.2d 474 (1987) (application of California's Unruh Act to Rotary Clubs does not violate First Amendment); *Roberts v. United States Jaycees*, 468 U.S. 609, 617-18, 104 S.Ct. 3244, 3249-50, 82 L.Ed.2d 462 (1984) (application of Minnesota's Human Rights Act to Jaycees does not violate First Amendment). Defendants argue that application of Title II to the Boy Scouts would infringe on both of

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[24]The First Amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." Defendants do not argue that Title II is unconstitutional on its face; such a claim would be unlikely to succeed in light of *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 108 S.Ct. 2225, 2233-35, 101 L.Ed.2d 1 (rejecting facial attack to New York's public accommodation statute). *See also Roberts*, 468 U.S. at 629-31, 104 S.Ct. at 3256-57 (rejecting argument that Minnesota's public accommodation statute was vague and overbroad).

A. Intimate Association

[12] The Supreme Court has recognized that the Bill of Rights, in order to "secure individual liberty," must afford protection from unjustified governmental interference to "certain kinds of highly personal relationships." *Roberts,* 468 U.S. at 618, 104 S.Ct. at 3250. Most obvious among those relationships are those that involve family bonds, such as marriage, procreation, education, and cohabitation with relatives. *Rotary International,* 481 U.S. at 545, 107 S.Ct. at 1945-46; *Roberts,* 468 U.S. at 619, 104 S.Ct. at 3250. This is because "[f]amily relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life." *Roberts,* 468 U.S. at 619-20, 104 S.Ct. at 3250.

Although freedom of intimate association may extend beyond family relationships, it generally includes only relationships which, like family relationships, "are distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship." *Id.* at 620, 104 S.Ct. at 3250. In determining the protection provided to a particular type of association, the Court must assess "where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments." *Id.* at 620, 104 S.Ct. at 3251. *See also Rotary International,* 481 U.S. at 546, 107 S.Ct. at 1946. Factors which are relevant to this assessment include "size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent." *Roberts,* 468 U.S. at 620, 104 S.Ct. at 3251. *See also Rotary International,* 481 U.S. at 546, 107 S.Ct. at 1946.

In arguing that membership in the Boy Scouts is a form of intimate association protected by the Constitution, defendants contend that such membership involves the education of children. Defendants point out that in *Roberts,* the Court cited, as examples of cases recognizing that "highly personal relationships" must be protected from unjustified governmental interference, the cases of *Pierce v. Society of Sisters,* 268 U.S. 510, 534-35, 45 S.Ct. 571, 573, 69 L.Ed. 1070 (1925), in

which the Court held that compulsory attendance at public schools interfered with the liberty to upbring and educate one's children, and *Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042 (1923), in which the Court invalidated a statute making it illegal to teach a foreign language to any child who had not yet completed the eighth grade. However, in noting that intimate association includes relationships which attend the "raising and education of children," *Roberts*, 468 U.S. at 619, 104 S.Ct. at 3250, the Supreme Court did not say that every form of association which in some way involves education is protected from all governmental intrusion.[25] The *Roberts* opinion must be read as a whole, and its emphasis on standards such as the size, purpose and selectivity of relationships cannot be ignored.

This is not a case where the government has directly impinged on the interests of parents or guardians to educate their children. Title II, as plaintiffs wish to apply it, does not affect the children's schooling, and to the extent that the Boy Scouts may have an educational function in addition to traditional schooling, Title II does not forbid a parent from ensuring that a child is exposed to that function. Title II would merely require that to the extent the Boy Scouts educates children, it do so without excluding certain children on the basis of criteria which Congress has determined to be improper.

In arguing that Title II infringes on rights to intimate association, defendants do not even discuss the specific factors recognized by the Supreme Court as governing the determination of whether a particular relationship constitutes intimate association. Plaintiffs, on the other hand, argue that an examination of those factors precludes any finding that the Boy Scouts involve intimate association. As alleged in the complaint, the Boy Scouts has over 4,000,000 members in the United

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[25]Thus, in *Runyon v. McCrary*, 427 U.S. 160, 175-76, 96 S.Ct. 2586, 2597, 49 L.Ed.2d 415 (1976), the Court held that application of 42 U.S.C. s 1981 to prohibit private, commercially operated, nonsectarian schools from excluding students on the basis of race did not violate rights of free association. The Court stated: "[I]t may be assumed that parents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desirable, and that the children have an equal right to attend such institutions. But it does not follow that the practice of excluding racial minorities from such institutions is also protected by the same principle.... '[T]he Constitution ... places no value on discrimination.' " 427 U.S. at 176, 96 S.Ct. at 2597 (emphasis in original; citations omitted).

States. Furthermore, as evidenced by the Boy Scouts literature attached to the complaint, the Boy Scouts is not selective in its admission of new members. (*See supra* at 1425-1427.) Assuming the truth of the complaint's allegations, the Boy Scouts is thus very similar in structure to other groups which have been held not to involve intimate association. See Rotary International, 481 U.S. at 547, 107 S.Ct. at 1947; Roberts, 468 U.S. at 620-21, 104 S.Ct. at 3251 (Jaycees); Curran, supra, 195 Cal.Rptr. at 336-37 (Boy Scouts). Accordingly, the Court cannot find as a matter of law that the Boy Scouts involves relationships of such a highly personal nature that application of Title II would violate members' rights of intimate association.

B. Expressive Association

1. Engagement in Expressive Association

[13] The right to associate for expressive purposes stems from an "individual's freedom to speak, to worship, and to petition the government for the redress of grievances[, which] could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed." *Roberts*, 468 U.S. at 622, 104 S.Ct. at 3252. In *Roberts*, the Court held that membership in the Jaycees involves rights of expressive association, based on the Jaycees' substantial activities which constitute "protected expression on political, economic, cultural, and social affairs." 468 U.S. at 626, 104 S.Ct. at 3254. These activities include the "tak[ing] of public positions on a number of diverse issues, ... [and] engage[ment] in a variety of civic, charitable, lobbying, fund-raising, and other activities worthy of constitutional protection under the First Amendment." *Id. See also* 468 U.S. at 622, 104 S.Ct. at 3252.

Defendants argue that application of Title II to the Boy Scouts "not only would ... require a change in the Boy Scouts' creed that 'no member can grow into the best kind of citizen without recognizing an obligation to God' ..., it would restrict Boy Scouts' ability to 'exclude individuals with ideologies or philosophies different from those of existing members.' " (Reply Mem. at 8-9.) This argument begs the

question. Clearly application of Title II restricts the ability of a place of public accommodation to exclude individuals with different religious philosophies, just as it restricts the ability to exclude individuals on other grounds, such as race. However, while "[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, ... it has never been accorded affirmative constitutional protections." *Norwood v. Harrison,* 413 U.S. 455, 470, 93 S.Ct. 2804, 2813, 37 L.Ed.2d 723 (1973). By its very terms, Title II always operates to prevent exclusion of people who are different. The more fundamental question is whether the particular organization engages in expressive activity which would be unduly infringed by application of Title II.

Defendants do not call the Court's attention to specific expressive activities which the Boy Scouts conducts--and indeed, consideration of such activities would be of dubious merit in the context of a motion to dismiss.[26] Furthermore, the Boy Scouts' own literature states that "partisan political activities are prohibited." (Appendix B.) To support the assertion that the Boy Scouts involves expressive association, defendants merely argue:

> The Boy Scout movement is designed and intended to transmit moral, spiritual, and cultural values. One of the purposes of the Scouting program is to help boys become honorable men. The members of Boy Scouts believe that this objective is best accomplished when a boy is taught to believe in God and to acknowledge a duty owed to a Supreme Being. ... Teaching boys to become men by insisting on recognition of a duty to God is expressive association "intended to develop good morals, reverence, patriotism, and a desire for self-improvement." (Mem. in Support at 15.) Defendants appear to argue that because the Boy Scouts is bound by a common belief, it follows as a matter of law that it engages in expressive association. A whites-only athletic club might

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[26]In light of the Boy Scouts' apparent tolerance for an innumerable variety of religious beliefs (*see supra* at 1426-1427), it is difficult to understand how the organization could--even if it so desired--present a unified expression on positions concerning religion.

similarly argue that its members are engaged in expressive association merely because they are bound by a common belief that whites are better than blacks. Without more than such a common belief, the Court cannot find, as a matter of law, that an organization engages in expressive association.[27] Whether an organization engages in expressive association is a question of fact, and questions of fact are not appropriately considered in connection with a motion to dismiss. Further, even if the Court were able to engage in a factual inquiry at this stage, defendants have set forth no facts which could lead to a finding that the Boy Scouts engages in expressive activity.

2. Unjust Infringement of Right to Expressive Association

[14] Even were it to assume that the Boy Scouts engages in expressive association, the Court would next need to inquire whether the Boy Scouts' freedom to engage in that expressive association is unjustly infringed by application of Title II. "The right to associate for expressive purposes is not ... absolute. Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Roberts,* 468 U.S. at 623, 104 S.Ct. at 3252. The Court in *Roberts* approached this analysis by balancing the extent of the infringement against the importance of the governmental interest at stake. 468 U.S. at 623-29, 104 S.Ct. at 3253-55.

In this case, it is not clear how Title II infringes on any expressive association in which the Boy Scouts may engage. Although the record does not indicate what those expressive activities may be, it does appear that they would not relate to religion. The Tiger Cubs membership application makes it clear that religious expression is

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[27]Defendants also rely on Justice O'Connor's concurrence in *Roberts:* "Even the training of outdoor survival skills or participation in community service might become expressive when the activity is intended to develop good morals, reverence, patriotism, and a desire for self-improvement." 468 U.S. at 636, 104 S.Ct. at 3259-60, citing, *inter alia,* W. Hillcourt, The Official Boy Scout Handbook (1979); P. Fussell, The Boy Scout Handbook and Other Observations 7-8 (1982). It is quite a leap from this dictum, in which Justice O'Connor (who did not join in the majority's discussion of expressive association) indicates that some scouting activities "might" become expressive, to a conclusion that as a matter of law the Boy Scouts engage in expressive association. The Court declines defendants' invitation to make that leap.

not central to the Boy Scouts' activities:

> The Boy Scouts of America recognizes the importance of religious faith and duty; it leaves religious instruction to the member's religious leaders and family. Members who do not belong to a unit's religious chartered organization shall not be required to participate in its religious activities.

(Appendix B.) Similarly, the Declaration of Religious Principle provides:

> The Boy Scouts of America maintains that no member can grow into the best kind of citizen without recognizing an obligation to God and, therefore, recognizes the religious element in the training of the member, but it is absolutely nonsectarian in its attitude toward that religious training. Its policy is that the home and the organization or group with which the member is connected shall give definite attention to religious life.

(Appendix B.) It thus appears that the Boy Scouts does not engage in overtly religious activities or expression, and accordingly that requiring the Boy Scouts to admit individuals who do not believe in God would not require the organization to alter any of its activities. Again, resolution of this issue is a question of fact, but even if the Court could resolve questions of fact to decide the motion to dismiss, it could find no basis, on the present record, for concluding that acceptance by the Boy Scouts of members who do not believe in God would have any effect on expressive activity--just as in *Roberts* there was no basis for concluding "that admission of women as full voting members will impede the organization's ability to engage in ... protected activities or to disseminate its preferred views." 468 U.S. at 627, 104 S.Ct. at 3254.[28]

Perhaps the Boy Scouts believe that its ability to express its views on non-religious matters would be affected by admission as members of individuals who do not believe in God because such individuals may have a different agenda than that of those who do believe in God.

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[28]By analogy, few would claim that the YMCA would be entitled to exclude blacks if the YMCA had a written policy that one of its purposes was to instill good morals in its members and that belief in white superiority was necessary to fulfill that purpose, even though expression of white concerns was not a major part of the YMCA's activities.

Such an argument, although theoretically plausible, would be an uphill battle. As the Court stated in *Roberts*, where it found no support for such an argument in the record:

> In claiming that women might have a different attitude about such issues as the federal budget, school prayer, voting rights, and foreign relations, or that the organization's public positions would have a different effect if the group were not "a purely young men's association," the Jaycees relies solely on unsupported generalizations about the relative interests and perspectives of men and women. Although such generalizations may or may not have a statistical basis in fact with respect to particular positions adopted by the Jaycees, we have repeatedly condemned legal decision-making that relies uncritically on such assumptions. In the absence of a showing far more substantial than that attempted by the Jaycees, we decline to indulge in the sexual stereotyping that underlies appellee's contention that, by allowing women to vote, application of the Minnesota Act will change the content or impact of the organization's speech.

468 U.S. at 627-28, 104 S.Ct. at 3255.[29] Thus the Boy Scouts may believe that individuals who do not believe in God are more likely to take positions which are immoral or have a deleterious effect on the training of young men. Such a belief would appear to be only religious stereotyping of the sort that is forbidden by Title II's inclusion of religion as an impermissible basis for discrimination. In any event, if defendants intend to argue that admission of individuals who do not believe in God would hamper the Boy Scouts' ability to engage in non-religious expression, that argument is premature because it raises questions of fact. Furthermore, even if the Court were allowed to engage in fact-finding at this stage of the case, it could find no indication on the present record that cessation of the Boy

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[29] *See also New York State Club, supra*, 487 U.S. at 13, 108 S.Ct. at 2234: "If a club seeks to exclude individuals who do not share the views that the club's members wish to promote, the [New York Human Rights] Law erects no obstacle to this end. Instead, the Law merely prevents an association from using race, sex, and the other specified characteristics as shorthand measures in place of what the city considers to be more legitimate criteria for determining membership."

Scouts' religious discrimination would affect expressive activities by the Boy Scouts. The Court cannot, therefore, find as a matter of law that Title II infringes on the Boy Scouts' right of expressive association.[30]

[15] Furthermore, if the Boy Scouts does engage in expressive association which would be infringed by application of Title II, the Court would have to weigh that infringement against the governmental interests at stake. (*See supra* at 1431.) The governmental interests served by Title II are compelling and unrelated to suppression of ideas. "[T]he fundamental object of Title II was to vindicate 'the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.' " *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250, 85 S.Ct. 348, 354, 13 L.Ed.2d 258 (1964) (citation omitted). Surely Congress could determine that a young agnostic or atheist, aware of his adherence to a minority position, would suffer this type of significant personal affront were he to be singled out an told by a large organization, which includes adherents to a wide variety of religious beliefs, that the particular minority belief held by the child is not good enough. The Supreme Court's discussion of the interests served by the Minnesota statute at issue in *Roberts* applies equally to Title II:

> On its face, the Minnesota Act does not aim at the suppression of speech, does not distinguish between prohibited and permitted activity on the basis of viewpoint, and does not license enforcement authorities to administer the statute on the basis of such constitutionally impermissible criteria. Nor does the Jaycees contend that the Act has been applied in this case for the purpose of hampering the organization's ability to express its views. Instead, as the Minnesota Supreme Court

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[30] *Cf. Hishon v. King & Spalding*, 467 U.S. 69, 78, 104 S.Ct. 2229, 2235, 81 L.Ed.2d 59 (1984) (law firm did not have freedom of association defense to Title VII where it failed to show how its ability to fulfill the function of making a contribution to the ideas and beliefs of our society would be inhibited). In contrast, in *Democratic Party of United States v. Wisconsin*, 450 U.S. 107, 101 S.Ct. 1010, 67 L.Ed.2d 82 (1981), a statute was held to infringe on the associational rights of members of a political party because "the inclusion of persons unaffiliated with a political party may seriously distort its collective decisions--thus impairing the party's essential functions." 450 U.S. at 122; 101 S.Ct. at 1019.

explained, the Act reflects the State's strong historical commitment to eliminating discrimination and [en]suring its citizens equal access to publicly available goods and services. That goal, which is unrelated to the suppression of expression, plainly serves compelling state interests of the highest order.

468 U.S. at 623-24, 104 S.Ct. at 3253 (citations omitted).

Like discrimination on the basis of sex, discrimination on the basis of religion--which Congress expressly included in Title II as an impermissible criterion--is "based on archaic and overbroad assumptions, ... deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life." Id. at 625, 104 S.Ct. at 3253. As with other forms of discrimination, religious discrimination stems from a long history of persecution--including the putting to death--of individuals based solely on their religious beliefs. With respect to atheism in particular, this history has been summarized as follows:

> One could fill many volumes with the abuse and calumny contained in the writings of Christian apologists, learned no less than popular. The tenor of these writings is not simply that atheism is mistaken but also that only a depraved person could adopt so hideous a position and that the spread of atheism would be a horrifying catastrophe for the human race.... [According to Ralph Cudworth, for example, d]ownright atheists were beyond the pale, for they had "sunk into so great a degree of sottishness" that they evidently could not be reached.... "The prevalence of atheism in any land," [Robert Flint] wrote, "must bring with it national decay and disaster." The triumph of atheism in England would "bring with it hopeless national ruin." ... All these quotations are from British Protestants. Very similar and frequently more virulent remarks could be quoted from German, French, Italian, and American believers of the same periods.
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> In France until the Revolution and in most countries until some time later, it was illegal to publish works in defense of atheism, and in fact real or alleged atheists were subject to dire

persecution throughout the times of Christian domination. Some of the world's greatest philosophers were among those who advocated and in some instances actively promoted this persecution.... Plato divided atheists into several groups, all of which must be punished; but whereas the members of some groups required no more than "admonition and imprisonment," those belonging to others deserved punishment exceeding "one death ... or two." Aquinas ... had no doubt that unbelievers should be "shut off from the world by death." ...

... "Promises, covenants, and oaths, which are the bonds of human society," [John Locke] wrote, "can have no hold upon an atheist." Moreover, since atheism is not a religion but, on the contrary, a position which is out to "undermine and destroy all religion," it cannot come under the privilege of the toleration that is justly claimed by bona fide religions....

... When the poet Shelley was an undergraduate at Oxford, he published a short and very temperate pamphlet entitled *The Necessity of Atheism.* This at once aroused a violent protest which resulted in the burning of all undistributed copies and in the expulsion of Shelley and his friend Thomas Hogg from the university. Some years later Shelley was judicially deprived of the custody of his children on the ground that he was "likely to inculcate the same [atheistic] principles upon them." As late as 1877 Annie Besant, the noted social reformer, was judged to be unfit to take care of her children on the same ground, although the judge admitted that she had been a careful and affectionate mother. Until the passing of the Evidence Amendment Act of 1869, unbelievers in Great Britain were considered incompetent to give evidence in a court of law. Atheists were thus in effect unable to sue when they were the victims of fraud or slander.... In the United States there has not been similar legal discrimination against atheists, but there is perhaps to this day more *de facto* discrimination and prejudice than in any other Western country.

P. Edwards, "Atheism," *The Encyclopedia of Philosophy* at 174-75 (ed. P. Edwards 1967). Modern thinking has tempered this discrimination. Thus:

> there are relatively few people nowadays in whom the thought of atheism and atheists arouses unspeakable horror. It seems to be agreed that an atheist can be a good man and that his oaths and promises are no less trustworthy than those of other people, and in most civilized lands atheists have the same or nearly the same rights as anybody else. What is more, it appears to be generally realized that some of the world's foremost philosophers, scientists, and artists have been avowed atheists and that the increase in atheism has gone hand in hand with the spread of education. Even spokesmen of the most conservative religious groups have in recent years conceded that atheism may well be a philosophical position that is adopted for the noblest of reasons.

Id. at 174. Title II's prohibition of religious discrimination is consistent with this modern recognition that stereotyping on the basis of religious belief or the lack of belief in God is unwarranted. As the above passages illustrate, discrimination on the basis of religion is similar in its nature and effects to discrimination on the basis of other criteria which society has deemed inappropriate. The government's interest in minimizing this discrimination should thus be equally compelling as its interest in minimizing other forms of discrimination.

Although defendants do not expressly raise this argument, there is one possible reason for finding that the interest of the government in eradicating religious discrimination is less compelling than its interest in eradicating other forms of discrimination. The exercise of religion, unlike conduct that discriminates on the basis of such grounds as race, sex, national origin, sexual orientation, or disability, has an express constitutional stamp of approval in the form of the free exercise clause of the First Amendment. Because the Constitution guarantees one's right to freely exercise one's religion, defendants might argue, the government does not have a substantial interest in forbidding discrimination based on religion.

Such an argument, however, would needlessly confuse the disparate rights of free exercise and freedom of association. Title II does not appear to infringe on free exercise rights, for it does not impede an individual's ability to practice one's religion. (Such interference would only occur, for example, if it were part of one's religion to participate in large, public organizations which excluded a certain minority group. *See also infra* at 1435-1436.) Furthermore, Title II does not impede one's ability to associate with other individuals for religious purposes. A group of people who share the same religious beliefs and gather for the purpose of expressing or acting on those beliefs would have a much stronger defense to a Title II action than a group which is composed of individuals of widely varying and inconsistent religious beliefs who leave religious instruction and practice to each member's family and religious institutions.

The government's interest in prohibiting religious discrimination by a sectarian organization which has a true religious purpose would indeed be minimal or nonexistent. However, the Supreme Court's existing framework for analyzing freedom of association would protect such a group; application of Title II would directly and substantially infringe on the group's right of expressive association. Such a scenario does not make the government's interest in combatting religious discrimination in general any less compelling than its interest in combatting other forms of discrimination.

Defendants have not shown that the governmental interests served by Title II's prohibition of religious discrimination in places of public accommodation are not compelling. Similarly, defendants have not shown as a matter of law that application of Title II to the Boy Scouts would infringe on its members' ability to engage in expressive association. (*See supra* at 1431-1433.) Thus, the Court cannot conclude, on the present record, that any infringement of the Boy Scouts' right of expressive association caused by application of Title II outweighs the governmental interests at stake.

C. Free Exercise of Religion

[16] Defendants also argue that application of Title II to the Boy Scouts would violate members' rights to the free exercise of religion.

Defendants cite no case law for this proposition, nor do they specify precisely how a prohibition on religious discrimination would interfere with members' ability to practice their religions. They simply argue that application of Title II "would prevent Scouts from joining together with others who, like themselves, believe in God in order to lead reverent lives in which a duty to God is acknowledged." (Mem. in Support at 16.) However, they do not claim that the Boy Scouts engages in any religious activities, or that membership in a Boy Scouts organization which excludes individuals who do not believe in God is an important part of members' religions. Furthermore, Title II clearly would not prevent religious individuals from associating with other religious individuals for the purpose of leading reverent lives. Title II may not even prevent such associations from excluding individuals who do not believe in God, for truly selective associations which have a genuine purpose of gathering to "lead reverent lives" may well qualify as private clubs which are beyond the reach of Title II.

Government actions may burden the free exercise of religion in a number of ways, some of which are permissible and some of which are not. First, the free exercise clause precludes governmental regulation of religious beliefs themselves. Accordingly, "[t]he government may not compel affirmation of religious belief, punish the expression of religious doctrines it believes to be false, impose special disabilities on the basis of religious views or religious status, or lend its power to one or the other side in controversies over religious authority or dogma." *Employment Division, Department of Human Resources of Oregon v. Smith,* --- U.S. ----, 110 S.Ct. 1595, 1599, 108 L.Ed.2d 876 (1990). In this case, defendants do not contend that Title II regulates members' religious beliefs as such.

Second, the government may not ban performance of physical acts (including assembling with others) if the ban is imposed only when the acts are performed for religious reasons or if the ban is imposed because of the religious beliefs displayed. Id. Here, defendants do not contend that Title II bans discrimination only when, or because, it is performed for religious reasons.

Third, government prohibitions of certain conduct may burden religious practices even though the practices may otherwise be

legitimately prohibited aside from their religious aspects. However, the Supreme Court has "never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." *Id.* 110 S.Ct. at 1600. Here, defendants do not contend that members engage in any religious practices through the Boy Scouts which are burdened by application of Title II. Further, they do not contend that members' religions require them to abstain from associating with those who do not believe in God;[31] in any event, such an argument would have questionable validity in light of *Employment Division.*

Defendants have made no showing that, as a matter of law, application of Title II in this case infringes on their right to free exercise of religion in any manner that has been recognized by the case law. Accordingly, the free exercise clause does not warrant dismissal of the complaint.

V. CONCLUSION

Defendants have raised several grounds in support of dismissal of the complaint, but each of those grounds either is devoid of any substantial legal authority or raises questions of fact which are unsuitable for resolution in the context of a motion to dismiss. The purpose of a motion to dismiss is not to decide the merits of the case, but to determine whether, assuming the facts alleged in the complaint to be true, the complaint states a cause of action. In this case, plaintiffs' complaint states a cause of action for violation of Title II. Defendants' motion is therefore denied.

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[31] Such a contention would seem implausible in light of the Boy Scouts' willingness to admit as members adherents of a wide variety of religions. (*See supra* at 1426-1427.)

Supreme Court, U.S.
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No. 93-597

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

MARK G.A. WELSH, a minor, and ELLIOTT A. WELSH, his father and next friend,

Petitioners,

v.

BOY SCOUTS OF AMERICA and BOY SCOUTS OF AMERICA WEST SUBURBAN COUNCIL #147,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENTS' BRIEF IN RESPONSE TO THE PETITION FOR A WRIT OF CERTIORARI

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Dated: November 11, 1993

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether Title II of the Civil Rights Act of 1964 can be applied to invalidate membership requirements that are central to the moral and spiritual values a private volunteer membership organization was formed to transmit?

2. Whether applying Title II of the Civil Rights Act of 1964 to force Boy Scouts of America to accept members who reject Scouting's core values, including in this case belief in God, violates the constitutional rights of association of the Boy Scouts and its volunteer members and leaders?

LIST OF PARTIES

The parties to the proceeding are:

Petitioners Mark G.A. Welsh and Elliott A. Welsh; and Respondents Boy Scouts of America and West Suburban Council Boy Scouts of America.*

There are no parent companies, subsidiaries or affiliates to list. Boy Scouts of America is a congressionally chartered corporation pursuant to 36 U.S.C. §§ 21-29. Boy Scouts of America and West Suburban Council Boy Scouts of America are not-for-profit corporations without stockholders.

* Respondent West Suburban Council Boy Scouts of America was sued under an incorrect name in the complaint.

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment of the Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a (1988), provides in relevant part:

> (a) All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.
>
> (b) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this subchapter if its operations affect commerce, or if discrimination or segregation by it is supported by State action:
>
> > (1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;

(2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;

(3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and

(4) any establishment (A)(i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment.

(c) The operations of an establishment affect commerce within the meaning of this subchapter if . . . (3) in the case of an establishment described in paragraph (3) of subsection (b) of this section, it customarily presents films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce; . . .

. . .

(e) The provisions of this subchapter shall not apply to a private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment within the scope of subsection (b) of this section.

42 U.S.C. § 2000a (1988).

No. 93-597

In The
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OCTOBER TERM, 1993

MARK G.A. WELSH, a minor, and ELLIOTT A. WELSH, his father and next friend,

Petitioners,

v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CICUIT

RESPONDENTS' BRIEF IN RESPONSE TO THE PETITION FOR A WRIT OF CERTIORARI

The respondents, Boy Scouts of America ("Boy Scouts") and West Suburban Council Boy Scouts of America ("West Suburban Council"), submit this brief in response to the petition for certiorari filed by petitioners Mark G.A. Welsh and Elliott A. Welsh. While respondents disagree with petitioners' statement of the issues and questions presented, they support the request for certiorari and urge that certiorari be granted on the questions set forth in this Brief in Response.

JURISDICTION

The judgment of the court of appeals affirming the judgment of the district court was entered on May 17, 1993. On August 3, 1993, Justice Stevens ordered that the time for filing the petition for writ of certiorari be extended to and including October 14, 1993. The jurisdiction of this Court to review the judgment of the court of appeals is invoked under 28 U.S.C. § 1254(1) (1988).

STATEMENT OF THE CASE

This case presents important questions of the scope of Title II of the Civil Rights Act on which the court of appeals divided. The questions are important because, as both the dissent and majority agreed, they are inseparable from an even more basic constitutional question: the First Amendment rights of the members of Boy Scouts to form an association for the purpose of expressing, transmitting and reinforcing certain values and beliefs, including religious ones, and to limit membership to those who share those values and beliefs.

These rights are now being attacked by a variety of plaintiffs in a variety of jurisdictions across the country under state as well as federal public accommodation laws. Definitive guidance by this Court is required lest these rights, and the interests they protect, be lost through sheer attrition. As demonstrated below, this is an appropriate case with an appropriate record to supply that guidance.

Elliott Welsh and his son Mark brought this action under Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a ("Title II"), to challenge the denial of their application for membership in Cub Scouts. The denial of membership was

based on the fact that, as agnostics, Elliot Welsh refused to subscribe to Scouting's Declaration of Religious Principle and Mark Welsh refused to subscribe to the Cub Scout Promise in the Cub Scout membership application.

Petitioners argue, as did the dissent in the court of appeals, that the majority decision holding Title II inapplicable to this denial of membership "conflicts with this Court's decisions" and "unduly restricts the scope of an important remedial civil rights statute." (Petition for Writ of Certiorari at 6.)

The majority's disputed construction of Title II was clearly shaped by consideration of the constitutional principle of freedom of association, a constitutional principle which the dissent felt had to be invoked in order properly to decide the case. As discussed below (*infra* at 22-23 & nn. 8-10), these interrelated statutory and constitutional issues have arisen again and again as litigants have challenged Scouting's membership policy under federal and state public accommodation laws around the country.

The right of association of Boy Scouts and other groups to limit membership to those who accept the association's moral and religious values is of little practical consequence if the members must defend themselves in full dress constitutional litigation in jurisdiction after jurisdiction simply to practice their beliefs. To be sure, the vast majority of cases have to date been correctly decided. That fact, however, does not negate the danger of loss of members' associational rights, not to mention the cost incurred in time and money, through constant litigation and occasional adverse trial court or administrative decisions that infringe associational freedoms. For example, sixteen months ago, in a case not yet argued at the intermediate appellate level in California, a trial judge ordered the Boy Scouts to admit into a Cub Scout Den two boys who, while believing in Santa Claus and the tooth fairy, did not

believe in God, and ridiculed those who do believe by telling a radio talk show host: "I mean, hey, is there somebody out there in fickelydoodle land?" *Randall v. Boy Scouts of America*, No. 650394 (Orange County Super. Ct. June 30, 1992), *appellate argument scheduled*, No. G012774 (Cal. Ct. App. Nov. 16, 1993).[1]

There are limits on the financial and administrative capacity of any volunteer organization to litigate these cases in forum after forum. Even when the wherewithal to continue litigation exists, the diversion of members' time and energies and the dissipation of their financial and other resources cannot help but undermine a volunteer organization's ability to fulfill its goals.

Belief in and Duty to God and Boy Scouts' Methods of Transmitting Values

The nature of Scouting's programs and values and the reasons for excluding those who do not accept those values are reflected in detailed and meticulously documented factual findings by the district court, which were not challenged on appeal. *See Welsh v. Boy Scouts of America*, 787 F. Supp. 1511 (N.D. Ill. 1992) (B-1); *Welsh v. Boy Scouts of America*, 993 F.2d 1267 (7th Cir. 1993) (D-1).[2]

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[1] Michael Randall made this statement on April 26, 1991 during an interview on Tom Lyekis's radio talk show. The transcript of this interview was admitted into evidence during the *Randall v. Boy Scouts of America* trial as Exhibit 340.

[2] References to "A__", "B__", "C__", and "D__" are to pages of the Appendix which are attached to the Petition for Writ of Certiorari. Petitioners inadvertently misnumbered pages B-2 to B-52 in Appendix B as C-2 to C-52. To avoid confusion respondents have provided the parallel citations in the official reporter.

There has never been any dispute that Boy Scouts is a *bona fide* non-profit membership organization dedicated to instilling values, including the value of doing one's duty to God, in boys and young people who join as members. *Welsh*, 787 F. Supp. at 1515, 1518 (C-6, C-11) (Stip. ¶ 10; Findings ¶ 1).[3] It is also undisputed that Boy Scouts requires as a condition of membership that all applicants recognize a duty to God, and that petitioners were not permitted to become members because they would not subscribe to that requirement. *Id.* at 1515, 1517 (C-6, C-10) (Stip. ¶¶ 7, 41-44).

The values set forth in the Boy Scout Oath and the Boy Scout Law are intended to be guides for living. *Welsh*, 787 F. Supp. at 1518 (C-11) (Findings ¶ 1) (S.A. 149-50, 152-54).[4] The Scout Oath or Promise has remained unchanged since the first Boy Scout Handbook was published in 1911. *Id.* at 1515 (C-6) (Stip. ¶ 11). It states:

> On my honor I will do my best to do *my duty to God* and my country and to obey the Scout Law, to help people at all times, to keep myself physically strong, mentally awake and morally straight.

Id. (C-6) (Stip. ¶ 11) (emphasis added). The Scout Law provides that a Scout is Trustworthy, Loyal, Helpful, Friendly, Courteous, Kind, Obedient, Cheerful, Thrifty, Brave, Clean and *Reverent*. *Id.* (C-6) (Stip. ¶ 12) (emphasis added).

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[3] References to "Stip. ¶ _" are to facts stipulated by the parties prior to trial and specifically relied upon by the district court. *See Welsh*, 787 F. Supp. at 1514-18 (C-4 to C-11). References to "Findings ¶ _" are to the district court's independent findings of fact. *See Welsh*, 787 F. Supp. at 1518-21 (C-11 to C-17).

[4] References to "S.A.___" are to pages of the Supplemental Appendix filed in the court of appeals. The record has not been certified to the Court at this time, but will be certified upon the Court's request.

In addition to the Boy Scout program for boys eleven to eighteen, Boy Scouts provides the Cub Scout program for boys eight to ten and the Tiger Cub program for seven-year-old boys. *Welsh*, 787 F. Supp. at 1514-17 (C-5, C-7, C-9) (Stip. ¶¶ 3, 18, 32) (S.A. 14, 49). In each program, a boy seeking to join must take an age-appropriate promise. *Id.* at 1515-17 (C-6, C-9) (Stip. ¶¶ 7, 18, 40). The Cub Scout Promise begins "I, (name), promise to do my best [t]o do my duty to God," while the Tiger Cub Promise begins "I promise to love God." *Id.* at 1516-17 (C-7, C-9) (Stip. ¶¶ 20, 33).

The structure of Boy Scouts emphasizes group activities under the direction of adult volunteers who act as role models as well as leaders. *Welsh*, 787 F. Supp. at 1515-16, 1519-20 (C-6 to C-7, C-13 to C-14) (Stip. ¶¶ 10, 16, 20; Findings ¶¶ 4-6) (S.A. 37-38). Members are organized into groups which consist of dens or patrols of six to eight boys of the same age, several of which meet together monthly as a pack or a troop. *Id.* at 1515-16, 1519-20 (C-6, C-8, C-13 to C-14) (Stip. ¶¶ 8, 23-24; Findings ¶¶ 4-5). Much of what a boy does as a member of Boy Scouts he does in the context of these groups. *Id.* at 1519 (C-13 to C-14) (Findings ¶¶ 4-6). A Cub Scout participates in regular meetings with his Den, which are generally held weekly in the home of his Den leader. *Id.* at 1516, 1519-20 (C-8, C-13 to C-14) (Stip. ¶¶ 23-24; Findings ¶¶ 4-6). Scouting transmits its values to youth members through the use of these small, primary groups. *Id.* at 1515-16, 1519-20 (C-6, C-8, C-13 to C-14) (Stip. ¶¶ 8, 23; Findings ¶¶ 4-6).

Boys in a Cub Scout Den are expected to advance together by fulfilling the requirements for one of the four basics ranks in Cub Scouting (Bobcat, Wolf, Bear, and Webelos) each year, working on them in Den meetings, by themselves and at home

with their parents. *Id.* at 1516, 1520 (C-7 to C-8, C-14) (Stip. ¶¶ 19, 20, 23); (S.A. 10, 47). Each rank has a requirement based on duty to God. (S.A. 55, 78-80, 91-96, 106-107.) For example, the first achievement in the Bear book requires that a Cub Scout, to achieve the Bear rank, must either practice his religion as he is taught at home or in his religious community, or work with his religious leader to earn the religious symbol of his faith. (S.A. 11, 91-96.)

The Cub Scout Promise is recited in unison at these meetings as a group-building and value-reinforcing activity. (S.A. 161-62.) If some members of a Cub Scout Den did not recognize a duty to God or other parts of the Promise, it would destroy the group's unity and minimize the effectiveness of Scouting leaders' efforts to transmit Scouting values. (S.A. 213-15, 223.) The impact of the Cub Scout leader and of the Den itself in reinforcing values through processes of small group socialization such as "normative advocacy" and "modeling" would also be undermined. (S.A. 216, 223-24.) Making the duty to God value "optional" would prevent the Den leader from strongly advocating that value, and minimize the effectiveness of the group in influencing the individual to internalize those values. (S.A. 216, 223-24.)

In addition, without the requirement that members recognize a duty to God, many volunteer leaders would not devote their efforts to Scouting and there would be a significant loss of religious sponsorship and involvement, thereby weakening Boy Scouts as an expressive voice. (S.A. 160, 186, 198-99, 203-04, 228-29.)

The District Court

Boy Scouts moved to dismiss the complaint on the grounds that Title II does not apply to Boy Scouts, and that in any event

it would be unconstitutional to apply Title II to Boy Scouts. *See Welsh v. Boy Scouts of America*, 742 F. Supp. 1413 (N.D. Ill. 1990) (D-1). The district court denied Boy Scouts' motion to dismiss, ruling that it could not accept Boy Scouts' arguments "without giving plaintiffs an opportunity to gather and present factual evidence." *Id.* at 1418 (D-5). Later, the district court denied the Welshes' summary judgment motion, reasoning that "this case is to a great extent one about the Boy Scouts' nature, its conduct, its true purposes, and its methods of achieving them. Only in resolving these factual questions can the Court decide the [statutory and constitutional] issues posed by this suit." *Welsh v. Boy Scouts of America*, No. 90 C 1671, 1991 U.S. Dist. LEXIS 5979, at *10, 1991 WL 78179, at *3 (N.D. Ill. May 6, 1991) (C-1, C-5).

Upon review of the full trial record about Boy Scouts' "nature," "conduct," "true purposes," and "methods," the district court concluded that groups of Cub Scouts and their parents and volunteer leaders who meet in a variety of locales from homes and backyards to church basements to parks and campgrounds are not "places," much less "places of entertainment" within the meaning of Title II. *Welsh*, 787 F. Supp. at 1538-39 (C-47 to C-49). The district court observed that "[p]rivate homes, for example, are rarely thought of as places of public accommodation . . . and to use the family home as the site which triggers Title II coverage would raise serious constitutional concerns." *Id.* at 1539 (C-48).

In reaching its conclusion that Congress had not intended Title II to apply to membership in Cub Scouting, the district court took particular cognizance of the interference with constitutional associational rights which would arise if the statute were given a broader reach:

> For where the benefits of membership flow primarily, if not exclusively, from the interpersonal association among the people who belong to the organization rather than . . . the physical accoutrements of a particular facility, the rival interests implicated by exclusion of an individual from the group become more difficult to resolve . . . . *The Court merely cites the clash between individual and associational rights* which is highlighted in the context of this case . . . as yet another signal that *entities like the Boy Scouts are almost certainly beyond the realm of establishments which Congress intended to reach through Title II.*

Welsh, 787 F. Supp. at 1540 (C-50 to C-51) (emphasis added).

The Court of Appeals

A divided court of appeals affirmed on the ground that Boy Scouts is not covered by Title II because it is not an organization that serves the public and is not a place of public accommodation. *Welsh v. Boy Scouts of America*, 993 F.2d 1267, 1278 (7th Cir. 1993) (A-23). The majority also found that Boy Scouts is exempt from Title II under subsection (c) because it is a private club and "Congress expressly excluded private clubs such as the Scouts from the operation of the statute. The Boy Scouts of America qualify as a private club because its Constitution and Oath contain requirements that serve to purposefully exclude nonqualifying applicants." *Id.* at 1278 (A-23).

In affirming on these statutory grounds, the majority noted that "[o]bviously, the discussion of the Boy Scouts' purpose and its right to determine whom to admit into membership impacts a constitutional right to Freedom of Association." *Welsh*, 993

F.2d at 1277 (A-22). The majority also noted that "[a] great deal is at stake in the interpretation of statutes such as Title II" because history teaches that it is "through the institutions of civil society, like the family, religious groups, and voluntary associations, which inculcate a sense of moral values in the young" that a virtuous, responsible citizenry exists:

> When the government . . . through the courts, seeks to regulate the membership of an organization like the Boy Scouts in a way that scuttles its founding principles, we run the risk of undermining one of the seedbeds of virtue that cultivate the sorts of citizens our nation so desperately needs.

Id. at 1278 (A-23 to A-24).

The dissent disagreed with the majority's interpretation of the statute, but would have upheld Boy Scouts' right to exclude those who do not share its belief in God directly on constitutional grounds "because the First Amendment protects organizations from having to accept those who do not share its most elementary beliefs." *Welsh*, 993 F.2d at 1279 (A-25). According to the dissent, "[t]he Scouts would suffer just the type of injury the First Amendment was designed to prevent if forced to admit members who refuse to subscribe to the organization's basic philosophy." *Id.* at 1283 (A-35).

REASONS FOR GRANTING THE WRIT

I. THE CORRECT INTERPRETATION OF "PLACE OF PUBLIC ACCOMMODATION" UNDER TITLE II AND ITS PRIVATE CLUB EXEMPTION TO PRIVATE VOLUNTARY ORGANIZATIONS LIKE THE BOY SCOUTS IS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

1. Respondent agrees with petitioner that the construction of Title II by the court below presents an important question of federal law which should be settled by this Court. The Court has never addressed the applicability of Title II and its private club exemption to voluntary organizations like the Boy Scouts. Unlike the amusement park operated as a business in *Daniel v. Paul*, 395 U.S. 298 (1969), or the other places set forth in the statute, groups like the Boy Scouts do not primarily provide recreational, entertainment, food or lodging services to the public at large but exist to transmit and express values among their members. These organizations thus implicate the right of freedom of association -- and the cognate freedom not to associate with those of opposing views -- recognized by this Court in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), *Board of Directors v. Rotary Club*, 481 U.S. 537 (1987), and *New York State Club Association v. City of New York*, 487 U.S. 1 (1988).

The petitioner here has never sought access to any particular building but rather to the camaraderie and shared values of a small group of boys doing Cub Scout activities. Indeed, the place in which a Cub Scout Den often meets is the home of the Den leader. Title II manifestly does not reach into peoples' private homes. *See Civil Rights Act: Hearing on H.R. 7152 Before the Subcomm. No. 5 of the House Comm. on the*

Judiciary, 88th Cong., 1st Sess. 1373-74 (1963) (statement of Attorney General Robert F. Kennedy).[5]

Petitioners seek admission to a group for the sake of sharing some of its values and activities without sharing or participating in the most basic belief and responsibility of all -- acknowledging belief in and duty to God, the foundation for Boy Scouts' system of ethical values. The Declaration of Religious Principle in Boy Scouts' By-Laws repeats the same words that the first Boy Scout Handbook told the first American Boy Scouts about their duty to God:

> The Boy Scouts of America maintains that no member can grow into the best kind of citizen without recognizing an obligation to God. In the first part of the Scout Oath or Promise the member declares, "On my honor I will do my best to do my duty to God and my country and to obey the Scout Law." The recognition of God as the ruling and leading power in the universe and the grateful acknowledgment of His favors and blessings are necessary to the best type of citizenship and are wholesome precepts in the education of the growing members.

(S.A. 18, 124.)

Where intimate association and expression of moral and religious beliefs are involved, the basis for applying a public accommodation statute does not exist; unlike the reasons for

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[5] In the section of Title II dealing with hotels and other temporary lodging, the statute expressly rejects the notion that a home, even one which caters to the public for commercial gain, could be a place of public accommodation. *See* 42 U.S.C. § 2000a(b)(1) (excepting guest house "which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence").

patronizing a restaurant, a motel, a public park or a movie theater, the reasons access is sought to organizations such as Boy Scouts are the intangibles of sharing a set of values and a sense of belonging -- enjoying the special quality of a group which comes together to reinforce its beliefs in the way it believes most effective. The food in a restaurant and the size of a bed in a motel do not change regardless of who eats or sleeps there. But the special quality of a volunteer organization and the values for which it stands would change and even perish if accommodations had to be made for those of contrary values. Frightening indeed would be that nation whose government could dictate the membership requirements of churches, synagogues, B'Nai Brith, Alcoholics Anonymous, patriotic societies and political parties -- of any group that, by standing together, sought to stand for anything.

The Court should take this opportunity to clarify where rights of association begin and where ingenious expansions and interpretations of public accommodation laws must end. The absence of definitive guidance from this Court is causing severe harm to voluntary organizations like the Boy Scouts. There has been no time during the last seventeen years when at least one public accommodation law challenge to the Boy Scouts has not been pending. Such challenges, moreover, have markedly increased in recent years. Presently, six other court cases and at least three administrative proceedings are pending across the country from California, Illinois and Kansas to New Jersey, Pennsylvania and the District of Columbia. (See *infra* at 22-23.) The record in this case presents a timely opportunity for resolution of these questions. The parties and the district court conducted the trial with conscious recognition of the need for a full record on all statutory and constitutional issues. *See*

Welsh v. Boy Scouts of America, 787 F. Supp. 1511 (N.D. Ill. 1992) (B-1).[6]

2. The Court also should address the related question of the availability of the private club exemption, 42 U.S.C. § 2000a(e) (1988), to voluntary organizations like Boy Scouts. While the dissent concluded that it would be "swimming upstream" and an "extreme" reading of the exemption to suggest that an organization as popular as Boy Scouts could qualify as a private club, the majority correctly held that the determinative factor is not the success or popularity of an organization but the "nexus between the organization's purpose and its membership requirements." *Welsh*, 993 F.2d at 1277, 1282-83 (A-22, A-33 to A-34).

The lower courts have looked at many factors to determine whether an organization is genuinely selective and private. But as in *Daniel v. Paul* itself, 395 U.S. 298, 301-02 (1969), the cases denying private club status have invariably involved sham requirements or subterfuges imposed simply to circumvent Title II, not basic, long-held organizational beliefs comparable to the Boy Scouts' belief in God. *See, e.g., United States v. Lansdowne Swim Club*, 713 F. Supp. 785, 796-97 (E.D. Pa. 1989) (swimming facility with membership cards available to all whites for a membership fee), *aff'd*, 894 F.2d 83 (3d Cir. 1990); *United States v. Johnson Lake Inc.*, 312 F. Supp. 1376, 1379 (S.D. Ala. 1970) (corporate recreational complex with membership available to whites who previously patronized the facilities); *see also Nesmith v. Young Men's Christian Association*, 397 F.2d 96, 101-02 (4th Cir. 1968) (YMCA building and

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[6] As the district court remarked at the conclusion of trial, "[i]t is such a difficult and challenging issue, but I am very honored and privileged to be the person to start this case on its way up to the Supreme Court of the United States." (Trial Transcript 654:16-19.)

athletic facility which had no standards for admission and held no membership meetings).

Title II expressly states that its provisions do not apply "to a private club or other establishment not in fact open to the public." 42 U.S.C. § 2000a(e) (1988). The legislative history reflects a Congressional understanding that Boy Scouts is a "private club."

Title V of the 1964 Civil Rights Act, which addresses the scope of the Civil Rights Commission's investigative authority, exempts "any private club" from the Commission's authority to collect and distribute information concerning discrimination in the use of public facilities. *See* 42 U.S.C. § 1975c(a)(4), (b) (1988). The draftsman of the Title V private club exemption was asked during floor debate whether the exemption would include "such organizations as the *Boy Scouts of America*, the Girl Scouts, the Future Farmers of America, the 4-H Clubs -- that type of organization." He replied: *"That would be covered by the term 'private club'* like the Kiwanis Club, the Lions Club, and so forth." 110 Cong. Rec. 2296 (daily ed. Feb. 6, 1964) (Statements of Rep. Williams and Rep. Meader) (emphasis added). In enacting the Civil Rights Act of 1964, then, Congress expressly adverted to the Boy Scouts as a private club.

The dissent's view that numbers are determinative would lead to the dangerous holding that nothing in the Act prevents its application to the membership requirements of *any* popular, nationwide organization which has been successful in attracting members, including churches and political groups. If this be so, Congress would not only have crafted a strange, paradoxical statute but one posing profound constitutional questions. Fringe groups with extreme messages and few members might not be covered by Title II, while organizations with goals and methods

attractive enough to make them potentially effective voices and "seedbeds of virtue" would be prevented from requiring that members share the very beliefs which the group exists to express and the sharing of which gives the group the cohesiveness to make its message effective.

II. THE FIRST AMENDMENT RIGHT OF VOLUNTARY ORGANIZATIONS TO ESTABLISH MEMBERSHIP REQUIREMENTS REFLECTING THEIR RELIGIOUS AND MORAL VALUES IS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT

Every opinion in the courts below acknowledges that the issues in this case center on the First Amendment freedoms of expressive and intimate association recognized by this Court in *Roberts*, 468 U.S. 609, *Rotary Club*, 481 U.S. 537, and *New York State Club Association*, 487 U.S. 1. The basic principle is that -- no matter how a particular public accommodation law may be worded -- Boy Scouts cannot be required to admit into their association one who does not believe in that which leads people to associate as Scouts in the first place. As the Court made clear in *Roberts*:

> There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire. Such a regulation *may impair the ability of the original members to express only those views that brought them together. Freedom of association therefore plainly presupposes a freedom not to associate.*

Roberts, 468 U.S. at 623 (emphasis added).

Nowhere is this more clear than in a case involving an organization whose values are based on a belief in God and whose activities are designed to foster the social, spiritual and moral growth of members' children in their own and their like-minded neighbors' private homes. Whether viewed in terms of personal autonomy and expression or in terms of assuring effective voices for expression of beliefs in the "marketplace of ideas," the freedom to associate in private groups and form volunteer organizations independent of both the government and the commercial sector should be recognized as a fundamental aspect of the First Amendment. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907 (1982). *See generally* James Douglas, *Why Charity? The Case for a Third Sector* (Sage 1983).

The district court, although deciding the case on statutory grounds, noted "the clash between individual and associational rights which is highlighted in the context of this case." *Welsh*, 787 F. Supp. at 1540 (C-51).

The majority in the court of appeals similarly understood the significance of the associational freedom at issue:

> A great deal is at stake in the interpretation of statutes such as Title II. The Founding Fathers recognized that a republic cannot endure without a virtuous citizenry. Successful self-government requires that citizens willingly participate in public affairs, make sacrifices for the common good, curb their selfishness, and join in taking responsibility for themselves and others. The central question of those concerned about maintaining the health of our republic must be, 'how do individuals acquire the virtues necessary for self-government?' History provides only one answer: through the institutions of civil society,

> like the family, religious groups, and voluntary associations, which inculcate a sense of moral values in the young . . . .

Welsh, 993 F.2d at 1278 (A-23).

In Judge Cummings's dissent, he specifically argued that the case should have been decided on constitutional grounds rather than "unduly narrow" statutory ones. In Judge Cummings's words:

> [T]he inquiry should not end there [with the words of the statute] because the First Amendment protects groups from having to admit those who do not share their most fundamental beliefs. *The right of association is among the most precious of liberties guarded by the Bill of Rights.* In *my opinion, the majority erred in failing to reach this constitutional issue.* My inclination would have been to hold that the Scouts could exclude atheists under a line of free association decisions suggesting that individuals may form groups in the pursuit of political, social, economic, educational, religious and cultural ends. '[B]y collective effort individuals can make their views known, when, individually, their voices would be faint or lost.' *The Scouts would suffer just the type of injury the First Amendment was designed to prevent if forced to admit members who refuse to subscribe to the organization's basic philosophy . . . .*

Welsh, 993 F.2d at 1283 (A-34 to A-35) (emphasis added) (internal citations omitted).

Justice O'Connor, in her concurring opinion in *Roberts*, even without benefit of the full record developed in this case regarding the nature and religious component of Scouting, explicitly recognized the expressive purposes of Scouting.

Justice O'Connor observed that "[e]ven the training of outdoor survival skills or participation in community service might become expressive when the activity is intended to develop good morals, reverence, patriotism, and a desire for self-improvement." 468 U.S. at 636 & n.* (quoting Paul Fussel's essay on the Boy Scout Handbook).

This case presents an especially compelling vehicle for delineating the scope of associational freedom because it involves rights of intimate association as well as expressive association. Boy Scouts, though a national organization, expresses its message to Cub Scouts primarily through interaction of small neighborhood groups -- Cub Scout Dens -- meeting with adult volunteer leaders in those leaders' private homes. *Welsh*, 787 F. Supp. at 1515-16, 1519-20 (C-6 to C-8, C-13 to C-14) (Stip. ¶¶ 8, 16, 23; Findings ¶¶ 4-6).

The membership requirements of Cub Scouts and Boy Scouts are also bound up with choices made by parents -- choices about the moral and religious upbringing of their children and the persons to whom they wish to open their homes. *See Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923). In this case the personal associational interests at stake are particularly striking because the value choices revolve around a basic question of religious and related ethical belief: belief in God and acknowledgment of such a belief as the foundation for the system of moral and ethical beliefs embodied in the Boy Scout Law.

Government may not "establish" secularism by preferring non-religious belief over religious belief. *School District of Abington Township v. Schempp*, 374 U.S. 203, 225 (1963); *see Sherbert v. Verner*, 374 U.S. 398, 404 (1963). Freedom of association must permit a voluntary association limited to those

who profess belief in God just as clearly as it permits an all-agnostic club. As the Court stated in *Gilmore v. City of Montgomery*, 417 U.S. 556 (1974), quoting with approval Justice Douglas's dissent in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 179-80 (1972):

> The associational rights which our *system honors permit* all white, all black, all brown, and all yellow clubs to be formed. They also permit all Catholic, all Jewish, or *all agnostic clubs to be established.*

Gilmore, 417 U.S. at 575 (emphasis added). An order to admit those unwilling to profess belief in God would fundamentally change the character of the Scout Oath, the Scout Law and the message sought to be inculcated by all Scouting activities -- from camping trips in the great outdoors where boys "are learning about God's beautiful world," to meetings begun with prayers and ended with benedictions, to the Cub Scout advancement program with its required religious achievements. (S.A. 41, 55, 78-80, 91-96, 106-07, 161-62.)

An association advancing particular viewpoints may legitimately determine membership on the basis of whether the proposed members "have a different view or agenda with respect to these matters." *New York State Club Association*, 487 U.S. at 13; *Roberts*, 468 U.S. at 627 (citing *Democratic Party v. Wisconsin*, 450 U.S. 107, 122 (1981) (recognizing the right of a political party to exclude those with adverse political beliefs)). Neither Title II nor any other statute could constitutionally mandate plaintiffs' admission when to do so would be to impair the ability of Scouts to associate, to "advocate public or private viewpoints," and to require the Boy Scouts "'to abandon or alter' . . . activities that are protected by the First Amendment," *New York State Club Association*, 487 U.S. at 13

(quoting *Rotary*, 481 U.S. at 548) -- and particularly not on matters of religious belief.

A State-mandated orthodoxy making God in the Boy Scout Oath and the Cub Scout Promise an option rather than the organization's bedrock value would force Boy Scouts to become as much a vehicle for the values of secular humanism as for Boy Scouts' own chosen values. No matter how the language of Title II or its many and varied State counterparts might be worded, no statute can constitutionally require that the opinions of secular authorities become more important to Scouting's programs than the guidance of the Scouts' volunteer chaplains or the ecumenical efforts of the volunteer members of its Religious Relationships Committee (see S.A. 172-75, 180-83, 185, 195-98, 200-04).

This case squarely poses the conflict recognized but not resolved in *Roberts*, 468 U.S. 609 and *Rotary*, 481 U.S. 537. In *Roberts* and *Rotary*, the Court found that the membership requirements at issue were unrelated to the groups' expressive goals because there was no distinction between the potential expression of the excluded class and the current expression of the membership, and because the groups served primarily commercial rather than expressive purposes. *See Roberts*, 468 U.S. at 627-8; *Rotary*, 481 U.S. at 548-49. The record here and the district court's findings make clear that the Boy Scouts is a completely different organization from those in *Roberts* and *Rotary*, and that there is an inescapable nexus between the Boy Scouts' goals and values and its membership requirement.

These constitutional issues are even more important than the correct construction of two phrases in Title II. Many states and localities have their own public accommodation laws or ordinances which may or may not be based on the concept of

"place" and may or may not have a private club exemption.[7] Unless the constitutional limits of these laws are clearly established, voluntary membership organizations like Boy Scouts will suffer continual assaults on their ability to associate only with those who share their basic beliefs.

Including this case, Boy Scouts or its local volunteer Councils are presently defending nine lawsuits or administrative proceedings seeking to change its membership requirements in six jurisdictions, and have been threatened with others. Several of these cases involve the duty to God requirement; others involve the moral values and membership requirements which prevent known or avowed homosexuals from becoming Scout leaders.

Even when the Boy Scouts defendants have prevailed,[8] the proceedings have frequently dragged on for many years,[9] and

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[7] *See, e.g.*, 43 Pa. Con. Stat. Ann. § 954(1) (Supp. 1992) (Pennsylvania Human Relations Act includes private club exemption); N.J. Stat. Ann. § 10:1-5 (1993) (New Jersey public accommodation law includes private club exemption); Ct. G.S.A. § 46a-64 (1993) (Connecticut public accommodation law does not include a private club exemption); M.G.L.A. c. 272, §§ 92A, 98 (1993) (Massachusetts public accommodation law does not include a private club exemption); Cal. Civ. Code § 51 (1971 & Supp. 1987) (California public accommodation law drafted to cover "business establishments").

[8] *See, e.g., Department of Human Rights v. Boy Scouts of America*, D.C. File No. MX 92-07717 (Minn. Dist. Ct. Aug. 6, 1992); *Mankes v. Boy Scouts of America*, 137 F.R.D. 409 (S.D. Fla. 1991); *Quinnipiac Council v. Commission on Human Rights & Opportunities*, 204 Conn. 287, 528 A.2d 352 (1987); *Schwenk v. Boy Scouts of America*, 275 Or. 327, 551 P.2d 465 (1976).

[9] *See, e.g., Quinnipiac Council v. Commission on Human Rights & Opportunities*, 204 Conn. 287, 528 A.2d 352 (1987) (11 years); *Curran v. Mount Diablo Council*, 147 Cal. App. 3d 712, 195 Cal. Rptr. 325 (1983) (12 years and still at intermediate state appellate level).

many are yet unresolved.[10] In these cases the constitutional issue may not be reached until months or years of litigation have occurred, and that ultimate issue may be resolved much differently from one state to another -- and much differently from the way in which it would be resolved by this Court.

The cost simply of defending these actions as they may be brought -- today in one state or county or municipality, next week or next month in another -- are themselves a tremendous burden, both in terms of expense and diversion of resources, for a volunteer organization such as Boy Scouts. The cost of a loss in any one jurisdiction would impact the Scouting movement nationally. The Boy Scouts' mission would be severely compromised as soon as its values ceased to be the same in Orange County, California as in Cook County, Illinois. The essence of Scouting is the consistency of its message. All Scouts say the same Oath and learn the same Law -- not a Law recited as written in some parts of the country and with key words omitted in others. Moreover, the testimony in this case confirms that any threat to the religious content of Scouting would alienate and threaten the disassociation of many parents, volunteers, Scout leaders and religious groups sponsoring Scouting units. (S.A. 160, 186, 198-99, 203-04, 228-29.)

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[10] *See, e.g., Merino v. San Diego County Council*, No. 659236 (trial scheduled); *Dale v. Boy Scouts of America*, No. Mon-C-330-92 (summary judgment motion pending); *Seabourn v. Coronado Area Council*, No. 92 C 140 (Kan. Dist. Ct. Aug. 31, 1993) (for Boy Scouts on statutory grounds); *Curran v. Mount Diablo Council*, No. C 365529, slip op. at 8 (Los Angeles County Super. Ct. July 25, 1991 (for Boy Scouts on constitutional grounds holding Boy Scouts' programs to be "overwhelmingly expressive"), *appeal docketed*, No. 2 Civ. B061869 (Cal. Ct. App. Sept. 27, 1991), *appellate argument scheduled* (Cal. Ct. App. Dec. 2, 1993); *Randall v. Boy Scouts of America*, No. 650394 (Orange County Super. Ct. June 30, 1992) (against Boy Scouts on statutory and constitutional grounds), *appellate argument scheduled*, No. G012774 (Cal. Ct. App. Nov. 16, 1993). In addition, there are administrative cases in Pennsylvania and the District of Columbia.

These people testified again and again that they devote so much time and energy to Scouting because it does unequivocally have a religious foundation. (S.A. 160, 164-65, 167-68, 198-99.)

Burdens of litigation should not be permitted to chill the exercise of First Amendment freedoms. Boy Scouts consists of parents, children and volunteers in small towns, suburbs and cities across the United States who devote untold time to this volunteer movement because they believe in its values and its methods. For many of them, the values of the Scout Law indelibly engraved in memory are a guide to their conduct throughout life. These people have every bit as much a need and right to know what their rights are as the plaintiffs who sue to be made members of Boy Scouts while rejecting its most basic values.

CONCLUSION

For all of the following reasons, the petition for a writ of certiorari should be granted on the questions presented herein.

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Respectfully submitted,

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